NOMINATION OF SANDRA DAY O'CONNOR

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF JUDGE SANDRA DAY O'CONNOR OF ARIZONA TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 9, 10, AND 11, 1981

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NOMINATION OF SANDRA DAY O'CONNOR

WEDNESDAY, SEPTEMBER 9, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Dole, Simpson, East, Grassley, Denton, Specter, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Baucus, and Heflin.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The Judiciary Committee will come to order.

It is a privilege to welcome each of you to the opening session of the Committee on the Judiciary to consider the nomination of Judge Sandra Day O'Connor of Arizona to serve as an Associate Justice of the Supreme Court of the United States. This is truly a historic occasion, as it is the first time in the history of our Nation that a President has nominated a woman to serve on this august body. Today we begin the consideration of this nomination.

Under the Constitution, the Senate is charged with the responsibility of deciding whether to grant consent to the nomination. While the entire Senate will participate in the ultimate decision, the members of this committee have an initial and solemn duty to conduct an indepth inquiry into the qualifications of Judge O'Connor.

In response to the trust placed in this committee both by our colleagues in the Senate and by the American people, we will conduct this proceeding in a full, fair, and orderly manner. In a spirit of nonpartisanship, we have made arrangements to receive both the testimony of the nominee and that of many persons representing the views of various constituencies.

As we begin our deliberations, we are keenly aware that a Supreme Court appointment is unique, not only because it grants life tenure but, more significantly, because it vests great power in an individual not held accountable by popular election. Accordingly, on behalf of the people it is our responsibility to reflect upon the qualifications necessary for one to be an outstanding jurist. We then must satisfy ourselves that this nominee possesses those qualifications.

Many believe that the courts of our Nation, over the past decades, have lost the confidence of the American people. This, we are told, results from far-reaching and sometimes burdensome decisions which have affected virtually every aspect of our lives.

As one of three coequal branches of our Federal Government, the judiciary plays a crucial role in interpreting the Constitution and in applying the laws of Congress. The ability of the Supreme Court to carry out effectively these responsibilities depends upon the perception of the people that the Court is worthy of such esteem. It is absolutely essential that the President nominate and the Senate confirm only individuals who will contribute to the restoration of public confidence.

We seek, first, a person of unquestioned integrity—honest, incorruptible, and fair.

We seek a person of courage—one who has the fortitude to stand firm and render decisions based not on personal beliefs but, instead, in accordance with the Constitution and the will of the people as expressed in the laws of Congress.

We seek a person learned in the law—for law in an advanced civilization is the most expansive product of the human mind and is, of necessity, extensive and complex.

We seek a person of compassion—compassion which tempers with mercy the judgment of the criminal, yet recognizes the sorrow and suffering of the victim; compassion for the individual but also compassion for society in its quest for the overriding goal of equal justice under law.

We seek a person of proper judicial temperament—one who will never allow the pressures of the moment to overcome the composure and self-discipline of a well-ordered mind; one who will never permit temper or temperament to impair judgment or demeanor.

We seek a person who understands and appreciates the majesty of our system of government—a person who understands that Federal law is changed by Congress, not by the Court; who understands that the Constitution is changed by amendment, not by the Court; and who understands that powers not expressly given to the Federal Government by the Constitution are reserved to the States and to the people, not to the Court.

Judge O'Connor is the first nominee to the Supreme Court in 42 years who has served in a legislative body. It is my belief that her experience as majority leader in the Arizona Senate will help her and, through her, the other members of the Court in recognizing and observing the separation of legislative, executive, and judicial powers mandated by the Constitution.

Judge O'Connor is also the first nominee to the Supreme Court in the past 24 years who has served previously on a State court. That experience gives us hope that she will bring to the Court, if confirmed, a greater appreciation of the division of powers between the Federal Government and the governments of the respective States.

Judge O'Connor, we welcome you to the committee and to the Senate. I know you share our anticipation as we begin the process which allows us the opportunity to renew the essence of the American experiment in government.

Before calling upon the distinguished Attorney General for his presentation of President Reagan's nominee, each member of the committee will be recognized for brief opening remarks. The Chair now recognizes the ranking minority member, Senator Joseph R. Biden of Delaware, after which the other members of the committee will be recognized.

Senator Biden?

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator **Biden**. Thank you, Mr. Chairman.

Welcome, Judge O'Connor, Senator Goldwater, Senator DeConcini, Congressman Rudd.

It is a very formidable task, I know, to sit there and react to the varying views of the Senators on this committee. There is no other committee in the U.S. Senate that reflects as widely and as thoroughly the views of the entire Senate. I wish you luck in your forthcoming efforts to answer all the questions that will be put to you.

There is no more important responsibility for the Senators who serve on this committee, in my opinion, Judge, than the one we will exercise today—that is, reviewing the qualifications of a nominee for the U.S. Supreme Court. The Supreme Court has a profound impact on the shape of our Government and the well-being of our people.

Accordingly, I believe it is necessary at the outset of these hearings on your nomination to define the nature and scope of our responsibilities in the confirmation process, at least as I understand them.

First, as a Member of the U.S. Senate, I am not choosing a nominee for the Court. That is the prerogative of the President of the United States, and we Members of the U.S. Senate are simply reviewing the decision that he has made.

Second, our review, I believe, must operate within certain limits. We are attempting to answer some of the following questions: First, does the nominee have the intellectual capacity, competence, and temperament to be a Supreme Court Justice? Second, is the nominee of good moral character and free of conflict of interest that would compromise her ability to faithfully and objectively perform her role as a member of the U.S. Supreme Court? Third, will the nominee faithfully uphold the laws and Constitution of the United States of America?

We are not attempting to determine whether or not the nominee agrees with all of us on each and every pressing social or legal issue of the day. Indeed, if that were the test no one would ever pass by this committee, much less the full Senate.

However, your views on social and legal issues and how these views will offset your interpretation of the Constitution of the United States are important. Indeed, in your case, Judge, I believe it is essential that the committee in these hearings make a thorough effort through intensive questioning on various issues, to better determine your judicial philosophy—not necessarily your precise position on an issue but what your philosophy of the law is.

I say this because if there is one aspect of this nomination that concerns me—and I must acknowledge it does not concern me very much at this point—it is your lack of extensive constitutional experience. Despite the intensive investigations into your background by the committee, both minority and majority, it is frankly difficult to determine from your record your depth of understanding and your precise views of American jurisprudence, and how you will apply that if you sit as a Supreme Court Justice.

It is my sincere hope that you will be able to demonstrate to us in these hearings that you do possess this competence, and I believe that in every other respect you are on the record an impressive nominee who is highly qualified to take a place on the Supreme Court of the United States.

You may find yourself in the position, Judge, where you have to make a determination of whether or not your response to a question would be in violation of the judicial canons of ethics. They seem, on their face, to preclude statements by nominees in any areas of the law that they might rule on in the future. However, for the purposes of legal scholarship and determinations of fitness for office, it is obviously necessary for nominees to state their views on matters of law and social policy.

The danger a nominee faces in making statements is that at some point in the future, a case that raises a particular issue may be presented for a ruling and the judge would have to disqualify herself based upon having prejudiced the issue in the past by testifying to it before the Senate committee.

However, I believe nominees should be required to answer all questions except for those questions that would necessitate an opinion as it applies to a specific set of facts that is likely to come before the judge for decision. In other words, a nominee can speak in general terms about the law but should not be forced to state opinions on controversies likely to come before her, for example, the constitutionality of a bill now pending before the U.S. Congress.

Therefore, you have a difficult task before you, one on which there is a great deal of dictum, if you will, but not any firm opinions. I wish you well in your effort to tread the path between complying with your view of the judicial canons of ethics and being forthright with this committee.

Last, I would like to say that there has been a good deal of discussion and there will be much more discussion about your being the first woman nominee to the Supreme Court. I think probably everyone in this body feels that it is high time and it is long overdue.

They often refer to the Senate as an exclusive club but there is no more exclusive club in the world than the one that you are attempting to join. There have been only 102 Supreme Court Justices during the history of this country, and I suspect that you will be a very worthy addition to that, making it number 103.

I welcome you again to the committee, look forward to hearing your answers, and wish you luck.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Mathias of Maryland, the ranking majority member.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Thank you, Mr. Chairman.

The chairman of the committee has called this a historic occasion. It surely is that. It is historic among other things because it culminates the effort to insure that women have full citizenship in this country.

Just 334 years ago, in 1647, Margaret Brent was denied the right to vote in the General Assembly of Maryland. She had all of the legal qualifications except one—she was a woman, so she was denied the right to vote. Now today, 334 years later, a woman will attain the ultimate right to vote, the right to vote on the Supreme Court of the United States.

Of course, I would say to Judge O'Connor that Mrs. Brent made one mistake in her attempt to get a vote. She thought she ought to have two votes, one as a representative of Governor Leonard Calvert's estate and one for herself: so I would learn from the lesson of history and only seek at this time a single vote on the Court.

However, I think it is important that we savor this moment because it is a milestone in the history of the Court itself, and there have been only a few of these moments. We should pause and realize that we are at the end of an era and at the beginning of an era. Sixteen years ago, President Johnson nominated Thurgood Marshall to the Court, and that was clearly a similar moment. President Johnson said on that occasion, "I believe it is the right thing to do, the right time to do it, the right man and the right place." By changing one word, I think that those words of President Johnson would be just as appropriate today.

I think President Reagan has demonstrated great vision and a fine sense of history in nominating Judge O'Connor for the seat that Justice Potter Stewart has held with such distinction for such a long time. Reference has been made here this morning to the fact that she comes from the State courts. But, in that, she follows in the footsteps of some of the most distinguished Justices who have ever served on the Court—Justice Cardozo, Justice Holmes, Justice Brennan—so she will serve in a good tradition.

Shortly after Judge O'Connor was nominated, I had an opportunity to meet with her and to discuss at length a variety of legal issues. During that conversation, I got a clear sense that when she is confirmed—I do not say if she is confirmed but when she is confirmed—that she will come to the Court as an interpreter of the law rather than as one who writes original law. That is a view with which I wholeheartedly concur, and so I shall look forward to the exchange between Judge O'Connor and the committee in these hearings.

I think it will be important to go beyond the symbolism which is so obvious to all of us today and to get to know her as a person and as a potential justice. I think consistent with our constitutional responsibility to grant or deny consent to the President's nomination we must review Judge O'Connor's qualifications to sit in the highest court in the land, and we will perform that duty, but I have no doubt as to the outcome of these hearings.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Kennedy of Massachusetts.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator **Kennedy**. Thank you very much, Mr. Chairman.

I, too, want to welcome the nominee to this committee, and say to Judge O'Conner that since the time that you recieved the President's endorsement, I think that you have seen both the worst of this city and the best of it—the worst in being the target of some of the single-issue constituencies who are going to urge your defeat, and the best in the fact that you have had the strong and unyielding support of a President of the United States, and strong bipartisan support from Members of the U.S. Senate who have been unflinching in support of your candidacy.

As a matter of fact, I have finally found an issue on which I can agree with Senator Goldwater. I am sure, as has been stated here, that the outcome for your confirmation is well understood. However, I am extremely pleased with President Reagan's decision to nominate Judge O'Connor to the Supreme Court. I am proud to join in the widespread acclaim for your nomination, and look forward to your confirmation and to your service on the Court.

As has been pointed out, for many years there have been women with the highest qualifications for the Nation's highest Court. Every American can take pride in President Reagan's commitment to select such a woman for this critical office but the broad support for Judge O'Connor in this hearing must not become a pretext to ignore the need for greater representation of women, not only on the Supreme Court but at every other level of the Federal judiciary and Federal Government.

Women hold less than 7 percent of all the Federal judgeships. In two centuries of Federal judicial history, only 50 women have been appointed to the lower Federal courts, and 44 of them are still serving there today. In fact, 33 of them were approved by this committee during the past Congress. All of us who care about this issue look forward to the day when appointments to the Federal bench and to the other high public offices will not stand out as an historic event simply because the appointees are women.

By some, Judge O'Connor has been termed a judicial conservative. However, simplistic labels are inadequate to define a complex concept like judicial philosophy, let alone predict a vote in a future case. What we seek in the Federal courts are judges who will display legal excellence and personal integrity and sensitivity to individual rights.

It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single-issue interest group. The disturbing tactics of division and distortion and discrimination practiced by the extremists of the "New Right" have no place in these hearings and no place in our Nation's democracy.

I look forward to Judge O'Connor's testimony and her response to the questions. Based on what I know today, I intend to support her nomination. I take pride in the opportunity to participate in these historic hearings.

The **Chairman**. Senator Laxalt of Nevada.

OPENING STATEMENT OF SENATOR PAUL LAXALT

Senator LAXALT. Thank you, Mr. Chairman.

Mr. Chairman, it is with great pleasure that I join with you and my colleagues in welcoming Judge Sandra O'Connor on this occasion of her confirmation hearings.

Although Judge O'Connor is no stranger to public life, she has received the full glare of the national attention given to a nominee for the U.S. Supreme Court, to say the least. In that spotlight, it is apparent that she enjoys overwhelming popular support from the varied and diverse people of our great Nation. This support must be heartening as you prepare for what we will all appreciate might be a necessarily grueling ordeal.

Judge O'Connor brings to this office a wealth of experience in the executive, legislative, and judicial branches of State government. However, it is not on one issue or one political question that the support of the American people is to turn. Rather, I think the people have expressed their confidence in Judge O'Connor's legal background, her professional record, and her personal abilities and integrity. I think that is an important distinction to make. I think you are here, Judge O'Connor, because you have been a fine judge and you have been a fine lawyer ahead of that, not a political activist.

On this committee we have Senators representing the entire spectrum of political thought in this country. However, we can all agree that the person chosen to fill the current vacancy on our Nation's Supreme Court must meet the highest standards of judicial temperament and integrity.

The purpose of these hearings is to inquire into these areas so that we and the American people can be assured that this lifetime appointment is filled by a person with the requisite character and skill to meet the challenges the Court will face in the decades ahead.

Therefore, Judge O'Connor and your very justifiably proud family, I welcome you to Washington and I look forward to the opportunity to join in the questioning. I wish you well, not only in the hours ahead but in the many distinguished years you will enjoy on our highest Court.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Byrd of West Virginia.

I do not believe he is here.

Senator Hatch of Utah.

OPENING STATEMENT OF SENATOR ORRIN HATCH

Senator HATCH. Judge O'Connor, we are very happy to have you and your good husband here today. I am very pleased to support President Reagan in your nomination to the U.S. Supreme Court. I am proud of a President who, whether you agree fully with his campaign promises or not, is at least trying to live up to them, and I think it is long overdue to have a woman on the Supreme Court of the United States of America.

Having spent over an hour with you and in other conversations with you, I am convinced that you meet many of the highest qualifications and standards that are essential to serve on the Supreme Court of the United States of America. I look forward to the questions and look forward to getting to know you better throughout this process.

Mr. Chairman, rather than take any more time, I would ask unanimous consent that the balance of my remarks be placed in the record at this point.

The CHAIRMAN. Without objection, it is so ordered.

[Material follows:]

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

OPENING STATEMENT FOR SANDRA O'CONNOR NOMINATION
SEPTEMBER 9, 1981

ARTICLE II, SECTION 2 OF THE CONSTITUTION STATES THAT THE PRESIDENT "SHALL NOMINATE, AND BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, SHALL APPOINT . . . JUDGES OF THE SUPREME COURT." ACCORDINGLY, WE SHARE WITH THE PRESIDENT THE VITAL CONSTITUTIONAL FUNCTION OF SHAPING THE FUTURE OF AMERICAN JURISPRUDENCE.

WE WOULD PROFIT BY RECALLING THE REASONS THE FRAMERS OF THE CONSTITUTION SPLIT THE NOMINATION PROCESS FOR SUPREME COURT JUDGES BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES. THE FRAMERS UNDERSTOOD THE IMPORTANCE OF THE SUPREME COURT TO THE NEW REPUBLIC. WHEN MOVING TO ELIMINATE INFERIOR FEDERAL COURTS FROM THE CONSTITUTIONAL PLAN, DELEGATE JOHN RUTLEDGE FROM SOUTH CAROLINA STATED THAT:

> [T]HE RIGHT OF APPEAL TO THE SUPREME NATIONAL TRIBUNAL [WILL] BE SUFFICIENT TO SECURE THE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENTS. (1 FARRAND 129)

THROUGHOUT THE SUBSEQUENT DEBATE IN WHICH INFERIOR COURTS WERE EXCLUDED BY VOTE AND THEN RESTORED BY A COMPROMISE THAT ALLOWED CONGRESS TO ESTABLISH THEM, THE DELEGATES REPEATEDLY AFFIRMED THEIR CONFIDENCE IN THE SUPREME COURT'S ABILITY TO PROTECT CONSTITUTIONAL RIGHTS AND SUSTAIN LAWS AND POLICIES DECREED BY CONGRESS.

THE FRAMERS, HOWEVER, KNEW THAT WORDS OF LAW COULD BE SLIPPERY. THEY HAD EXPERIENCED SUCH INDIGNITIES AT THE HANDS OF THE KING'S MAGISTRATES. RECOGNIZING THAT THE INTEGRITY OF THE CONSTITUTION'S WORDS WERE AT STAKE, THEREFORE, THEY WOULD NOT LEAVE THE FORMATION OF THE SUPREME COURT TO ONE MAN. IF ENFORCEMENT OF THE CONSTITUTION WERE TO BE COMMITTED TO THE HANDS OF THE JUSTICES, THE FRAMERS WANTED

TO BE SURE, IN THE WORDS OF ALEXANDER HAMILTON, THAT THEY DESIGNED "THE PLAN BEST CALCULATED . . . TO PROMOTE A JUDICIOUS CHOICE OF MEN (INCIDENTALLY, I THINK ALEXANDER WOULD EXTEND HIS LANGUAGE TO INCLUDE WOMEN IN THIS INSTANCE.) FOR FILLING THE OFFICES OF THE UNION." IN SHORT, THIS PLAN WOULD PROVIDE A DOUBLE CHECK ON NOMINATIONS TO INSURE THAT THE CONSTITUTION AND SUCH WORDS AS "DUE PROCESS" OR "EQUAL PROTECTION" MEAN WHAT THE AUTHORS INTENDED NOT SIMPLY WHAT FIVE APPOINTEES MIGHT CUMULATIVELY CONCOCT. HAMILTON CONTINUED TO STATE WHY ONE MAN COULD NOT BE GIVEN THIS VITAL TASK:

> [ADVICE AND CONSENT] WOULD BE AN EXCELLENT CHECK UPON A SPIRIT OF FAVORITISM IN THE PRESIDENT, AND WOULD TEND GREATLY TO PREVENT THE APPOINTMENT OF UNFIT CHARACTERS FROM STATE PREJUDICE, FROM FAMILY CONNECTION, FROM PERSONAL CONNECTION, OR FROM A VIEW TO POPULARITY. AND, IN ADDITION TO THIS, IT WOULD BE AN EFFICACIOUS SOURCE OF STABILITY IN THE ADMINISTRATION. (FEDERALIST #76)

THUS THE FRAMERS UNDERSTOOD THE PIVOTAL ROLE OF THE NATION'S HIGHEST JUDICIAL FORUM AND SPECIFICALLY PROVIDED A TWO-STEP SELECTION PROCESS FOR ITS JUDGES.

WE HAVE ALL HEARD THE ENTHUSIASTIC BOAST OF FORMER CHIEF JUSTICE CHARLES EVANS HUGHES THAT "WE ARE UNDER A CONSTITUTION, BUT THE CONSTITUTION IS WHAT THE JUDGES SAY IT IS." THIS IS THE UNINHIBITED SPIRIT THE FRAMERS MEANT TO CHECK BY INVOLVING THE SENATE IN THE SELECTION OF JUDGES. THE FRAMERS OF THE CONSTITUTION FORESAW THAT THE SUPREME COURT WOULD HAVE EXTENSIVE AUTHORITY TO INSURE THAT THEIR DOCUMENT WOULD BE PROPERLY ENFORCED. PRECISELY FOR THIS REASON, THEY OBLIGATED THE SENATE TO PROTECT THE CONSTITUTION IN THE NOMINATION PROCESS.

THIS PLACES UPON US A GRAVE RESPONSIBILITY. THIS RESPONSIBILITY WITH REGARD TO JUDGE SANDRA O'CONNOR IS ONE THAT I PERSONALLY AM DELIGHTED TO PARTICIPATE IN, NOT ONLY BECAUSE OF ITS IMPLICATIONS FOR THE INTERPRETATION OF THE CONSTITUTION, BUT BECAUSE I FEEL THAT JUDGE O'CONNOR'S SENSE OF CONSTITUTIONAL JUSTICE WILL BE WORTHY OF THE TRUST PLACED IN THE SUPREME COURT BY THE FOUNDING FATHERS. AS WE EMBARK UPON THIS INVESTIGATION, HOWEVER, I WOULD LIKE TO REMIND MY COLLEAGUES AND MYSELF THAT THE STAKES ARE HIGH. WE ARE DECIDING TODAY THE FUTURE OF OUR MOST SACRED DOCUMENT.

The CHAIRMAN. Senator Metzenbaum of Ohio.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge O'Connor, I look forward to this hearing with an open mind and with a deep sense of inward gratification. I am openminded with respect to the confirmation process but I would be less than frank if I did not admit a high degree of enthusiasm over the fact that President Reagan has seen fit to appoint the first woman to the U.S. Supreme Court.

I come to this hearing with no preconceived notions. If I happen to disagree with you on any specific issues, it will in no way affect my judgment of your abilities to serve on the Court. It is a matter of concern to me, however, that there are certain groups who have spoken adversely about this appointment by reason of some of your votes or actions as a State legislator.

I have some very strong feelings about judicial appointments. Basically, I think that the appointee must be a person of integrity; a person strong enough to stand up for his or her point of view; a person who has been shown to be a highly qualified legal scholar; and a person who will have the kind of character that reflects well on the judiciary in general.

Your being a woman appointee would not, in and of itself, be sufficient reason for me to vote to confirm. However, your being a qualified and able woman of character and ability would provide me with a great amount of satisfaction in knowing that I had a part in the historic process of your confirmation to the Supreme Court.

The CHAIRMAN. Senator Dole of Kansas.

OPENING STATEMENT OF SENATOR ROBERT DOLE

Senator DOLE. Thank you, Mr. Chairman.

I, like everyone else in this committee, welcome Judge O'Connor to the committee. I want to commend the chairman for the fine attendance we have this morning, an indication of strong leadership. We appreciate that.

However, as I think has been said, we are all aware of the uniquely historic occasion that we are participating in, particularly those of us who are privileged to serve on this committee. Whatever else these hearings may tell us, I have a sense already of your own feeling for the institution to which you have been nominated by President Reagan.

The Supreme Court stands at the very center of American life. Its decisions define public policy for decades to come. The words used to explain its reasoning shape the law and its practice for thousands of practitioners and millions of citizens.

Not least of all, the Court in recent times has been called upon to render judgments in cases of almost bewildering complexity, fraught with delicate moral or social implications. Should you be confirmed and take your place alongside our other brethren, you will undoubtedly find yourself confronted with issues Solomon himself might agonize over.

It is not my job, nor does it fall within the realm of senatorial prerogative as I understand it, to nail down precisely your views on a host of controversial questions you may face on the bench. However, it is useful I think to call to mind the words and the example of Oliver Wendell Holmes.

Mr. Justice Holmes was a legal interpreter, not an independent policymaker. When a young friend seized the opportunity to urge him to, as he put it, "Do justice," Holmes replied: "That is not my job. My job is to play the game according to the rules."

The Judiciary Committee is faced with the job of examining your prior record and assessing your present qualifications to perform a role with profound impact on American society. Most of all, however, we are here to learn if you, like Mr. Justice Holmes, intend to play the game according to the rules.

In this regard, I find it encouraging that you bring to these hearings a rich and varied background. Some Justices come to Washington known chiefly as legal educators. Others are Washington lawyers, leaders of the bar, or prominent figures from State and national politics.

Justices may pursue many paths to the Court but few have won separate reputations, as you have, on the campus, in the legislature, in the practice of law, and on the State bench. Few have arrived in this city with a better insight into the legislative and judicial dichotomy.

Having helped to write laws, I expect you have come to appreciate the limitations of statutes alone. Having interpreted laws, I expect you have come to value the continuity of precedent and the wisdom of plain commonsense. Of course, as your presence here demonstrates, it is sometimes plain commonsense to break with precedent. I might add, better 190 years late than never.

No single act by a President reverberates with greater historical force than his nominations to the Supreme Court. No senatorial function ranks higher in importance than deciding the qualifications of would-be Justices. In that spirit, and cognizant of the special interest that surrounds this nomination, I look foward to exploring in detail your judicial philosophy.

I would add, Judge O'Connor—and I think I can summon the ghosts of Roger Taney and Louis Brandeis to my side in saying this—you are among friends.

The **Chairman**. Senator DeConcini is next but he will be heard from later.

Senator Simpson of Wyoming.

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

Senator **Simpson**. Thank you, Mr. Chairman.

"Historic" is overused here this morning but very appropriate. I have a special feeling about the situation since I happen to represent the State of high altitude and low multitude, where we had the first woman justice of the peace, we had the first woman Governor, and we also were the first State in the Union to give women the right to vote, an interesting thing at that time of our rather robust history.

Therefore, it is a historic occasion, the confirmation of a Supreme Court Justice. I think it achieves our very fullest and most solemn task in the constitutional advise and consent function of the Senate.

I have a fascinating footnote. Less than half of the Members of the Senate were serving in this body when we confirmed the last Justice of the Supreme Court, as recently as December of 1975. Now that either says a lot about the tenure stability of judges, or I have a hunch it actually says a great deal more about the realities of the job security enjoyed by your inquisitors who are here arrayed today. [Laughter.]

Therefore, it is an extraordinary position, life tenure. The purpose of it, of course, was to allow the judiciary to operate freely without political tampering that so weighted down previous judicial systems. The judiciary then was to transcend the politics so properly part and parcel of the other two branches.

That marvelous check and balance that has proven so very workable and so very flexible in over 200 years also requires that members of the Federal judiciary submit themselves to the scrutiny and the searching inquiry of the executive and the legislative branches, and the latter is what we are up to today.

Really, seldom does the constitutional process offer such a very direct participation and observation. This proceeding I think would be perceived with great favor by the Founding Fathers. I think it is just exactly what they had in mind.

Just a final personal note, Mr. Chairman. I am very impressed by this lady. I greatly enjoyed my first visit with her. She is an observant, bright, lucid, articulate, thoughtful, sharp, curious person. She has a nice touch of wit and a warm sense of humor which one sorely needs when the brittle, cold winds of ridicule and harsh judgment whistle around this place, I can tell you, and the place east of us across the pasture there.

Therefore, I think we need more legislators as judges, just as we have come to enjoy on this panel that remarkable judge from Alabama, Senator Heflin, who adds so much to our deliberations here. I do feel an extra special form of kinship with Judge O'Connor. My path that led me here is very similar to the one that she took, both serving as attorneys and assistant attorney general, and in the general practice of law and civic work, and legislators in the State legislature where you never become known as a statesman. You are just the guy or the gal that voted against the "red fox bill," and I know how tough that gets. The judge was also majority floor leader, and that is something I enjoyed so much, much better than being minority floor leader.

Therefore, you have a diverse and lively background and you are an involved and committed woman in both your public and your personal life. I commend you, who have served as attorney and judge and legislator, involved citizen, wife, mother.

Then to find one final tidbit of accord, your son Brian O'Connor and my son Colin MacKenzie Simpson are classmates and seniors together at Colorado College and enjoy each other's company very much, out in the West we both enjoy. That must be an Irish and Scots situation beyond belief.

Enough: My time runs. However, I do feel that here is a person who brings a real touch of class to this office, this Government, this city, and this place. I think that we will all perceive that at the conclusion of the hearings. I shall be listening with great interest, and I welcome you, Judge.

The CHAIRMAN. Senator Leahy of Vermont.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman.

If I had to choose one moment to explain the most about the way the American system of government worked, it would probably be the moment when we choose a Justice of the Supreme Court. It is a moment when the interests of all three branches of Government join, also when the guardianship of the Constitution has to be safely conveyed.

The Supreme Court has succeeded as the interpreter of the Constitution, arbiter of great conflicts, not only because of wisdom and a sense of history but because even in the most divided times in this country, the American people have kept the sense and feeling of respect that the Court has earned. Above all, this has been a Court of fairness and a Court of competence. It is these qualities that must characterize any nominee to that Court.

I believe that Judge O'Connor comes to this committee with impressive credentials, and I praise President Reagan in making this appointment. I also praise his wisdom in picking somebody who has historical ties to the State of Vermont, and I am sure that that must have had something to do with the position you find yourself in today.

Her tenure on the appellate division bench has not been long in years but I think, to go back to some of the history that Senator Dole referred to earlier, we should realize that only 60 of the 101 Justices sitting now or in the past have had any prior judicial experience. Only 41 of these had over 5 years of service when confirmed, and among those who had no prior experience were included John Marshall and Joseph Story, Roger Taney and Louis Brandeis, and if you do not count his service as police judge, Hugo Black.

Our examination of Judge O'Connor's judicial philosophy, that is relevant and important, but we should not condition our confirmation on her agreement with any opinions of ours, so long as her philosophy is within the norms set down by the Constitution itself. We are a pluralist republic, no less on the bench than in a Vermont town meeting or a national election.

I enjoyed my own visit with Judge O'Connor. I told her at that time I really did not care whether she was a Republican or a Democrat, a conservative or a liberal. That is not the issue. The issue is one of competence and whether she has a sense of fairness. I am convinced on both counts.

No one can now safely forecast the issues that will dominate the coming years on the Court, but certain questions never will and never should go away—how to balance the powers among the branches of Government and how to maintain the Court's coequal status while serving as the ultimate forum on the actions of other branches and States, will always be perplexing. The right answers have never been obvious, and they will not be during the time you serve on that Court. So far in our history there has been a remarkable acceptance of judicial interpretations, a willingness to make the necessary changes to conform to judicial mandate.

Federalism is another issue that will never be settled for all time. However, Judge O'Connor's background as a jurist, a legislative leader, and a legal writer convinces me that she would bring to the Court a bounty of practical experience in dealing with these sensitive issues.

However, in the end the Court's highest duty is liberty. In the United States there is no national dogma, no unvarying platform, no orthodoxy save the notion that all other rights proceed from the right of free expression. Not every Supreme Court decision will be popular, and decisions upholding nonconformist expression will be particularly unpopular.

John Chipman Gray once wrote that "A court generally decides in accordance with custom because a community generally thinks its customs right.* * * The custom and the ethical creed are usually identical. But which of the two is the real source of the law is shown in the cases where they differ."

There may come times when the modern electronic revolution—television, political polls, and computer-armed direct mail experts on the right or the left—may demand instant consensus. However, one institution that must survive such times is the Supreme Court, where instant consensus must never result in instant justice.

In conclusion, as Justice Brandeis once said, "If we would guide by the light of reason, we must let our minds be bold." I think you have a mind that is and will be bold, Judge O'Connor. I welcome you here today, and I look forward to these hearings.

Thank you.

[Material follows:]

Opening Statement
of
Senator Patrick J. Leahy
Before the
Senate Judiciary Committee Hearings on
the nomination of Judge Sandra Day O'Connor to be
an Associate Justice of the Supreme Court
of the United States
September 9, 1981

If I had to choose one moment that explained the most about the way the American system of government worked, it would probably be the moment when we choose a Justice of the Supreme Court. It is a moment when the interests of all three branches of government join and a moment when the guardianship of the Constitution must be safely conveyed.

The Supreme Court has succeeded as the interpreter of the Constitution and the arbiter of great conflicts not only because of wisdom and sense of history, but because even in the most divided of times the Court has earned and kept the respect of all Americans. Above all, this has been a Court of fairness and competence. It is these qualities that must characterize any nominee to the Court.

Judge O'Connor comes to this Committee with impressive credentials, having been active in the practice of law, in the leadership of the Arizona Senate, as a trial judge, and thereafter a state appellate judge. While her tenure on the Appellate Division bench has not been long in years, it is easy to forget that the Supreme Court demands a diversity of talent and experience, more than length of service in the judicial branch. Only 60 of the 101 Justices sitting now or in the past have had any prior judicial experience, and only 41 of these had over five years of service when confirmed. And among those with no prior experience whatsoever were John Marshall, Joseph Story, Roger B. Taney, Louis D. Brandeis, and Hugo L. Black (if you exclude his service as a police judge).

These next days will give us a chance to hear Judge O'Connor's views on a wide range of legal topics. But while our examination of her judicial philosophy is relevant and important, we should not condition her confirmation on her agreement with any opinions of ours, so long as her philosophy is within the norms set down by the Constitution itself. Ours is a pluralist republic, no less on the bench than in a Vermont town meeting or a national election.

It may be said that every new Justice comes to the Supreme Court at a particular Constitutional moment. If the wisdom of the Constitution is eternal, the task of discovering that wisdom is never-ending. No one can now safely describe the present Constitutional moment or forecast the issues that will dominate the coming years on the Court. But certain questions never will and never should go away. One is how to balance the powers among the branches of government. The Supreme Court ultimately decides if the will of Congress has been followed when laws are applied or, in some instances, if Congress has faithfully followed the Constitution.

All will agree that the power to declare the acts or resolves of other branches of government invalid has never raised the Court over the other branches or over the states. Maintaining the Court's co-equal status while serving as the ultimate forum on the actions of other branches and the states will always be perplexing. The right answers have never been obvious. For example, who would have quibbled with the words of the Court when it said in 1946, "It is hostile to a democratic system to involve the judiciary in the politics of the people." Yet I quote from a case that declined Supreme Court review of state apportionment decisions, a case overruled in 1962 by Baker v. Carr. And who would argue today that for nearly 20 years since Baker the cause of equal representation has dramatically improved because the Court decided, reluctantly, that there are moments to become involved in controversies generally left to the states?

So far in our history there has been a remarkable acceptance of judicial interpretations and a willingness to make the necessary changes to conform to judicial mandate. The willingness comes from a respect for the Court as an institution that places justice over personality and pressures of the moment. That willingness will be renewed and the Court's readings of the Constitution will be accepted as the last word so long as they continue to merit what Lincoln once referred to as "claims to the public confidence." That confidence must endure, if the uniqueness of the Court is to endure.

Federalism is another issue that will never be settled for all time. Chief Justice Chase said more than a hundred years ago

THAT "THE CONSTITUTION, IN ALL OF ITS PROVISIONS LOOKS TO AN INDESTRUCTIBLE UNION, COMPOSED OF INDESTRUCTIBLE STATES." TIME, CHANGE, AND THE MOBILITY OF OUR SOCIETY HAVE PUT TERRIBLE PRESSURES ON OUR UNION, AND THE GROWTH OF GOVERNMENT WEIGHS HEAVILY ON THE FABRIC OF FEDERALISM. JUDGE O'CONNOR'S BACKGROUND AS A JURIST, LEGISLATIVE LEADER, AND LEGAL WRITER CONVINCES ME THAT SHE WOULD BRING TO THE COURT A BOUNTY OF PRACTICAL EXPERIENCE IN DEALING WITH THESE SENSITIVE ISSUES.

BUT IN THE END, THE COURT'S HIGHEST DUTY IS LIBERTY. IN THE UNITED STATES THERE IS NO NATIONAL DOGMA, NO UNVARYING PLATFORM, NO ORTHODOXY, SAVE THE NOTION THAT ALL OTHER RIGHTS PROCEED FROM THE RIGHT OF FREE EXPRESSION. NOT EVERY SUPREME COURT DECISION WILL BE POPULAR, AND DECISIONS UPHOLDING NONCONFORMIST EXPRESSION WILL BE PARTICULARLY UNPOPULAR. JOHN CHIPMAN GRAY ONCE WROTE:

> "A COURT GENERALLY DECIDES IN ACCORDANCE WITH CUSTOM BECAUSE A COMMUNITY GENERALLY THINKS ITS CUSTOMS RIGHT...THE CUSTOM AND THE ETHICAL CREED ARE USUALLY IDENTICAL. BUT WHICH OF THE TWO IS THE REAL SOURCE OF THE LAW IS SHOWN IN THE CASES WHERE THEY DIFFER."

THERE MAY COME TIMES WHEN THE MODERN ELECTRONIC REVOLUTION -- TELEVISION, POLITICAL POLLS, AND COMPUTER-ARMED DIRECT MAIL EXPERTS -- MAY DEMAND INSTANT CONSENSUS. ONE INSTITUTION THAT MUST SURVIVE SUCH TIMES IS THE SUPREME COURT, WHERE INSTANT CONSENSUS MUST NEVER RESULT IN INSTANT JUSTICE.

TODAY IS A TIME FOR THE COURT TO EXAMINE MORE DEEPLY THAN EVER THE LIMITATIONS ON ITS POWER AND ITS ROLE IN THE SCHEME OF OUR GOVERNMENT. BUT THE PRESSURES ON THE COURT TO YIELD UP THE GAINS OF THE PAST GENERATIONS IN LIBERTY AND EQUALITY MAY BE SUBSTANTIAL,AND IT IS THEREFORE ALSO A TIME TO BE WATCHFUL AND STRONG.

AS JUSTICE BRANDEIS ONCE SAID, "IF WE WOULD GUIDE BY THE LIGHT OF REASON, WE MUST LET OUR MINDS BE BOLD."

WE WELCOME JUDGE O'CONNOR AND LOOK FORWARD TO BEING WITH HER DURING THESE IMPORTANT HEARINGS.

The CHAIRMAN. Senator East of North Carolina.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I welcome you this morning and congratulate you on your nomination. Senator Simpson is absolutely right in implying that every Member of the Senate has somewhat of an envy of those who may be going on to the Supreme Court for that lifetime appointment. We live in that very imperfect and unsettled world of having to run for reelection, and grappling with high interest rates and related matters, so we do envy you down deep in our heart of hearts, no question about that.

It is an honor, as a freshman Senator, to be a part of this very important process of confirming a Justice to the U.S. Supreme Court. This is a historic occasion, not only because you are the first woman nominee but because this, of course, represents the first great opportunity of this administration to change the general course and direction of the U.S. Supreme Court, one of the three great, vital institutions of the American system of government.

Therefore, I look forward to being a part of this. I hope that our questions can be questions of substance and depth so that we can fulfill our constitutional obligation as a part of the confirmation process.

Mr. Chairman, in the interest of time I would like the balance of my remarks to be entered into the record.

The CHAIRMAN. Without objection, so ordered.

Senator EAST. Again, my congratulations to you for your nomination, and I welcome you here to the Senate Judiciary Committee this morning.

[Material to be supplied follows:]

STATEMENT OF SENATOR EAST ON CONFIRMATION OF SANDRA O'CONNOR

Mr. Chairman, I thank you for this opportunity to make a few opening remarks on this very important nomination.

Perhaps the most important question before the Committee today is not whether Judge O'Connor is to be confirmed as a Supreme Court Justice, but what the role of the United States Senate ought to be in the process of selecting a Justice of the Supreme Court. The Constitution imposes on the Senate the duty to exercise an advice and consent function. In my view, this duty includes a responsibility to scrutinize carefully all of the nominee's qualifications to sit on the High Court. Among the most important of these qualifications is that the nominee have a profound respect for the Constitution. Such respect for the Constitution can only be evidenced by a determination to interpret that document according to its true meaning, and to abjure the law-making function that the Supreme Court has taken unto itself in recent years.

If I am correct in thinking that the Senate must scrutinize the degree to which a nominee respects the Constitution as a document to be interpreted according to its true meaning, then the question arises how

Senators are to inform themselves in this area. Unlike education and experience, a nominee's constitutional philosophy cannot be reduced to lines on a resume. Nor is a nominee's own self-description as a "strict constructionist" or a "judicial conservative" likely to be helpful, since such labels mean different things to different people. Unless a nominee has a long record of prior judicial decisions on constitutional law, or other writings on the Constitution and what it means, the only way for a Senator to find out whether the nominee will interpret the Constitution according to the intentions of its framers is to ask specific questions about constitutional law.

There is, of course, a significant limitation on a Senator's right to receive candid answers from a nominee on questions of constitutional law: It would be wrong to expect promises of certain votes in particular future cases. But this is no bar to full discussion of past cases and competing doctrines. Such discussion does not amount to a promise because the Senators and the nominees ought to understand that no judge can decide how to rule on a case without having read the briefs, heard the oral arguments, and conferred with the other members of the court.

With the understanding that no promises will be requested or received, I fervently hope that Judge O'Connor will be willing to share with us her views on constitutional law, including her reactions to the Supreme Court's past cases.

Only with the benefit of such information will the Senate be able to exercise its constitutional advice and consent function in an informed and intelligent fashion.

The CHAIRMAN. Senator Baucus of Montana.

OPENING STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

I would like to take this opportunity to address the nominee directly.

Judge O'Connor, this is a special occasion for each of us. It is our first Supreme Court nomination hearing, and I thought it would be fitting to use this short time to tell you how I personally feel about this nomination.

For you, as a judge, as a lawyer, as a citizen, as a woman, as a human being, it is a great personal tribute and a high honor to be nominated by the President of the United States to be an Associate Justice of the United States Supreme Court.

For me, this is a moment of special responsibility under the advise and consent powers given the Senate by article 2 of the Constitution, to determine whether your nomination should be confirmed. I view it as an important obligation to assure the American people that you are a nominee of the highest integrity and competence; that your view of the Constitution, your view of our form of government, and your view of the role of the Supreme Court are consistent with the best interests of our Nation.

For our country, it is our brief and only opportunity to examine an individual who will have profound impact on us, our children, and our grandchildren. Once confirmed, life tenure will give you the requisite independence to decide cases fairly and wisely, yet that tenure will also forever foreclose any opportunity to review your performance.

As a former State legislator who faced several moments of truth with Arizona voters, I am sure you appreciate the value of that kind of public accountability. In a sense, these hearings will be your last opportunity for public accountability. I hope you approach them in that light.

Finally, for our Nation this is one of those rare opportunities to examine the role of the Supreme Court and try to determine its proper relationship to the Congress, to the President, and to individual citizens.

I therefore believe that it is incumbent upon us, each of us, to be thoughtful, candid, and forthright, and to take the time to fully and completely exercise our obligations.

I will ask you about general principles you believe a judge should follow in deciding cases. I will ask you how you, as a member of the Court, would go about increasing our citizens' respect for the Supreme Court and the Federal judiciary. I will ask you whether Congress should respond to decisions of the Supreme Court by limiting Supreme Court review of constitutional questions. Finally, I will ask you how you, Justice Sandra O'Connor, hope to be remembered in history. I look forward to our discussion of these issues.

Thank you very much.

The CHAIRMAN. Senator Grassley of Iowa.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. Judge O'Connor, I once again extend my congratulations to you on your nomination for Associate Justice of the Supreme Court.

Your nomination is important in and of itself and because it will hopefully set the stage for fulfillment of President Reagan's promise to reverse a current trend in the Federal courts. We hope that this nomination will be the first of several appointments to the Supreme Court by this President and that it will signal a dramatic return by Federal court appointees at all levels who are committed to the preservation of our greatest constitutional principles.

Through the strict observation of both the separation of powers by restraining from legislating from the bench, as well as vigorous enforcement of the division of powers by acting when necessary to prevent the Congress from usurping powers reserved to the States, will start the Court back down the road in the right direction. We also pray that these Reagan appointees will differ from many recent appointees by showing at least as much compassion for society's innocent victims as its criminal wrongdoers. These are the qualities of individuals the President promised to appoint when he was campaigning, and indeed that was the explicit pledge of the platform upon which he ran.

It is already apparent that you, Judge O'Connor, exhibit some of those qualities, just by the mere fact that you are sitting before us today. I have the utmost respect for President Reagan's judgment, and I received the impression through our meeting a few weeks ago that you are a warm, perceptive, and articulate person. I also can see from your judicial opinions, published comments, and record in the State legislature, that you are a master of the law as well.

I debated with myself about approaching the subject of the fact that you are a woman but I think it is necessary to recognize that that fact alone may indicate more about your character and competence than anything which appears on your résumé. That is because the profession of law was closed to women for a long time both legally and figuratively. Your presence here today indicates to me that you had the stamina to succeed in what was and still is a male-dominated arena. I just want to let you know that I admire you for your success.

However, we must not forget that your selection by the President is made only with the advice and the consent of this Senate. This constitutional role is not one to be taken lightly. Our questioning of you and other nominees must be thorough and direct, and we must insist upon at least as much clarity and candor in your answers to our questioning as has been given by other recent nominees to the Supreme Court. At the conclusion of these hearings, we must be able to report not only to the full Senate but also to the President, and indirectly to the citizenry who elected him, that your nomination represents a campaign promise kept.

Hopefully our report will be that you are the perfect model for future Reagan Court appointees—that you, Judge O'Connor, as an individual are first committed, without apology and uncompromisingly, to protecting the role of the States within the constitutional concept of division of powers within our Federal system of government; that you, Judge O'Connor, are secondly an individual committed personally and professionally to limiting your role in the judicial branch to adjudication rather than legislation; and that you as an individual are lastly committed to opposing the permissiveness which has fostered disrespect for society's laws and disrespect for the sanctity of life.

Your responses to these questions posed by myself and my colleagues will contribute to the outcome of this report; be it favorable or otherwise, and I hope that they will clear up some of the conflicting contentions that have been raised since the announcement of your nomination.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Senator Heflin of Alabama.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator **HEFLIN**. Mr. Chairman, I ask unanimous consent that a prepared statement appear in the record as if read in full but I will attempt to limit myself to the requested time of 3 minutes and will abbreviate my statement.

Mr. Chairman and Judge O'Connor, the task that brings us here today is a most important one. It is the process by which a branch of Government renews itself, of regeneration, of pumping new blood into the life of a great and vital institution.

In my opinion—and I say this, Mr. Chairman, only after careful reflection—there are only two institutions absolutely indispensable to the independence, health, and maintenance of our republic: a free, fair, vigorous press, and a strong and independent judiciary. While Presidents may come and go, their faithful execution of the law is subject to an ultimate check. While a great many men and women may deliberate and legislate in these very Halls, the laws they pass do not interpret themselves.

The Federal judiciary—the highest court in particular—not only has the last word as to what our laws say but also as to whether they may permissibly say it. The Court to which this capable jurist has been nominated is the ultimate arbiter of our most sacred freedoms, the guardian of our most cherished liberties.

In fulfilling our constitutional duty to advise and consent, the men and women of this body will cast no more important vote in this session of Congress, for we are voting not so much to confirm Sandra Day O'Connor but to reaffirm our belief in the very concept of justice and its preeminence among values in a free and thriving republic.

As our first President told his Attorney General, Edmund Randolph, some two centuries ago, "The administration of justice is the firmest pillar of government." If justice is both the ultimate goal and indispensable for the survival of a free republic, we best insure it by the people we select as its custodians. That is what we are about today—selecting a custodian for our most precious commodity, a trustee for our most valuable resource.

I am one of the few Senators who have had the privilege of knowing the nominee personally before her nomination. Having participated with her under the leadership of the Chief Justice of the United States in the recent Anglo-American legal exchange on criminal justice, I learned firsthand of her exceptional intelligence, her hard-working preparation of the issues at hand, and her unswerving adherence to integrity.

Further, knowing of her deep devotion to the American judicial system, I can safely venture that President Reagan's appointment to the Supreme Court will reflect great credit on his administration, the Court itself, and indeed the Nation at large.

Judge O'Connor, if I could leave you with but one guiding thought, it would be to carry indelibly etched in your conscience and follow as religiously as is humanly possible, the admonition of one of our greatest jurists, Learned Hand, who wrote, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

Thank you.

The CHAIRMAN. Without objection, the Senator's entire statement will be placed in the record.

[Material follows:]

STATEMENT OF SENATOR HOWELL HEFLIN
NOMINATION OF JUDGE SANDRA DAY O'CONNOR
ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT
THE U.S. SENATE COMMITTEE ON THE JUDICIARY
SEPTEMBER 9, 1981

"The task which brings us here today is a most important one. It is the process by which a branch of government renews itself--of regeneration, of pumping new blood into the life of a great and vital institution.

In my opinion, and I say this, Mr. Chairman, only after careful reflection, there are only two institutions absolutely indispensable to the independence, health and maintenance of our republic--a free and vigorous press, and a strong and independent judiciary. While Presidents may come and go, their faithful execution of the laws is subject to an ultimate check. While great men and women may deliberate and legislate in these very halls, the laws they pass do not interpret themselves.

The federal judiciary--the high Court in particular--not only has the last word as to what our laws say, but also as to whether they may permissibly say it. The court to which this capable jurist has been nominated is the ultimate arbiter of our most sacred freedoms, guardian of our most cherished liberties.

In fulfilling our constitutional duty to advise and consent, the men and women of this body will cast no more important vote in this session of Congress. For we are voting not so much to confirm Sandra Day O'Connor, but to reaffirm our belief in the very concept of justice, and its preeminence among values in a free and thriving republic. As our first President told his Attorney General, Edmund Randolph, some two centuries ago, "The administration of justice is the firmest pillar of government."

If justice is both the ultimate goal, and indispensable for the survival, of a free republic, we best insure it by the people we select as its custodians. And that is what we are about today--selecting a custodian for our most precious commodity, a trustee for our most valuable resource.

And yet nowhere is there to be found a set of standards for selecting these custodians of justice. Since Chief Justice John Jay took the oath of office in 1789, 101 justices have sat on the Supreme Court. While this record should provide some guidance for us, it is of limited assistance, for they have differed as much in their judicial philosophies as in their passion for the law. Greatness on the Court is neither measurable nor clearly definable. It may derive from a coherent philosophy expressed with unequalled brilliance, as was the case with Justice Holmes, or from a vast currency of experience by the creative mind of a Justice Brandeis. It may stem from an unrelenting effort to restrain judicial activism by a Justice Rehnquist, an unquenchable thirst for liberty, as with Justice Douglas, or the passionate love of free expression of my fellow Alabamian, Hugo Black.

When asked to catalogue the criteria for judicial selection, we normally--and somewhat automatically--list legal ability, character, and judicial temperment. To these qualities, I would respectfully add three perhaps more fundamental: (1) an understanding of the proper role of the judiciary in our constitutional and federal scheme; (2) a deep belief in, and unfaltering support of, an independent judiciary; and (3) an abiding love of justice.

If I might elaborate ever so briefly:

(1) Regarding the proper role of the judiciary: It is the constant struggle of all federal judges, and the ultimate issue they must confront, to preserve the balance between the powers of the federal government and those of the states--while at the same time protecting the constitutional guarantees of all Americans. It is the supreme test of judicial acumen to preserve that balance, to which an understanding of the proper role of the federal judiciary is indispensable.

(2) The framers of the Constitution were painfully aware of encroachments on judicial independence. Indeed, denial to the colonies of the benefits of an independent judiciary was one of the grievances against King George III enumerated in the Declaration of Independence. If the judgment of our highest custodians of justice is at all compromised, if it is based on timidity or hesitation arising from public or political pressure, our legacy of judicial independence will be undermined. Justice compromised is justice aborted.

(3) There must be a passionate love of justice, the great cement of a civilized society, the guardian of all life and liberty. If injustice can divide us--pitting black against white, old against young, have-nots against haves--justice can bring us together as a people, and as a Nation.

Mr. Chairman, against these highest and noblest of standards, I have examined this nominee, and find that she meets them, every one. Judge O'Connor's record of accomplishment, both in public and private life, is exemplary--a seasoned private practitioner; a vigorous prosecutor; skillful legislator; respected jurist; legal scholar; bar, civic and political leader; faithful wife; and devoted mother. The breadth of her service is surpassed only by the excellence with which it was rendered. More importantly, it enables Judge O'Connor to bring unique qualities to the Court: an abiding respect for the law; a deep understanding of our economic and political institutions; a clear view of the proper role of the judiciary; and a rare appreciation of the values of Americans as a people. I dare say these qualities, and her record to date, are a harbinger of judicial greatness.

So I join my colleagues in welcoming Judge O'Connor. Having participated with her, under the leadership of the Chief Justice, in the recent Anglo-American legal exchange on criminal justice, I learned first hand of her exceptional intelligence, her hard working preparation of the issues at hand and her unswerving adherence to integrity. Further, knowing of her deep devotion to the American judicial system, I can safely venture that President Reagan's appointment to the Supreme Court will reflect great credit on his Administration, the Court itself, and, indeed, the Nation at large.

Judge O'Connor, as of this moment, I expect you to be confirmed. But in a way I do not envy you--your job, should you be confirmed, and that of your colleagues on the Court, will be the most difficult in the free world. As you know--or will undoubtedly soon learn, cases reaching the Supreme Court are not the "who ran the red light" variety. The most fundamental questions of liberty, and life itself, will reach you; the most intractable and emotional problems of a complex and diverse society.

I began by saying we are involved in the process of institutional renewal. As Justice Cardoza put it, "The process of justice is never finished, (it) reproduces itself, generation after generation, in ever-changing forms. Today, as in the past, it calls for the bravest and the best."

Mr. Chairman, I believe his words ring just as true today, and in Sandra Day O'Connor I believe we have "the bravest and the best." Judge O'Connor, I wish you well. If I could leave you with but one guiding thought, it would be to carry indelibly etched in your conscience, and follow as religiously as is humanly possible, the admonition of one of our greatest jurists, Learned Hand, who wrote, "If we are to keep our democracy there must be one commandment: Thou shalt not ration justice."

Thank you.

The **Chairman**. Senator Denton of Alabama.

OPENING STATEMENT OF SENATOR JEREMIAH DENTON

Senator **Denton**. Thank you, Mr. Chairman.

Welcome, Judge O'Connor.

As I remarked at our meeting in July, I am personally delighted that President Reagan has nominated a lady to be Associate Justice of the Supreme Court. For an attorney, this is the highest tribute which the Government can bestow, and by his choice the President has reposed the highest trust in you as an American, an attorney, and as a jurist. I congratulate you on that nomination. I respect you. I like you.

Although many of my colleagues have previously and publicly indicated their approval of your nomination, and your appointment seems highly likely, I am obliged by conscience—the only one I have—to raise certain issues. First, it has been brought to my attention that President Reagan may have been misled by a July 7, 1981 report prepared by a senior Justice Department official, a report which purported to represent your record and your attitude on matters, some of which were subjects specifically established in the 1980 Republican platform, and one of which has been reported to have been verbally established by our President as a criterion for filling the first Supreme Court vacancy.

It appears from some analyses that there is a substantial difference between your record and the Justice Department official's report of your record, and that there may be reason for the concern in the minds of many regarding these differences on such issues as abortion and women in combat, among others. I hope we can clear up that matter.

While I realize that people of good conscience can be in favor of abortion under certain circumstances, I firmly believe that this Government is founded upon respect for the dignity of humankind. While respecting the differing views of others, I would consider the establishment by our Government of a disposition amounting to a permanent decision not to protect the life of an unborn human being to be a point of no return in a recently accelerated, alarming trend away from the principles upon which our Government was founded and by which this Nation achieved greatness.

In my understanding, that greatness derives from the consentual definition of humankind as possessing infinite dignity and worth by virtue of being a form of life created in the image and likeness of God, with the inalienable rights of man, the prerogatives for those rights, being endowed by that same Creator. By that concept, the revolutionary conclusion was reached that governmental direction did not repose in the overriding divine right of a single king but in the consent of the governed, each one of which was considered equal to all others in this respect of dignity.

Granting that abortion is a single issue but counting it fundamental to our democratic form of Government, I regard legalized abortion as a denial of the most fundamental and efficacious national principle of this Nation. My judgment on voting on your confirmation or on the confirmation of any other nominee—male or female—to the Supreme Court will be affected by that belief of mine.

Your answers at this hearing, not your previous record, will determine my estimate of your position on this and other issues because I trust you and because I know you, like many others I have known, can have changed your mind and still be changing your mind on this issue. I believe the Congress has been changing its collective mind, as evidenced by the recent passage by the Senate of the Hyde amendment.

Each of us Senators on this committee must fulfill, according to his own conscience, his role as set forth in article 2, section 2 of our Constitution, and my vote will be a reflection not of my respect for you or President Reagan, but will reflect my best estimate of how your appointment would tend to affect the general welfare of this country.

It is my earnest hope that your responses will be neither broad nor bland, because I will base my single vote on those responses. Since I am not a lawyer, I would request, Mr. Chairman, that a statement by a constitutional lawyer, Mr. William Bentley Ball—which differs with some of the opening statements made today—be placed in the record. I ask unanimous consent that that be done.

The CHAIRMAN. Without objection, the balance of the statement by the distinguished Senator from Alabama will be placed in the record.

Senator DENTON. Thank you, Mr. Chairman.

[Material follows:]

PREPARED STATEMENT BY SENATOR JEREMIAH DENTON

Welcome Mrs. O'Connor: As I told you at our meeting in July, I am personally delighted that President Reagan has nominated a woman to be Associate Justice of the United States Supreme Court. For an attorney this is the highest tribute which the government can bestow, and by his choice the President has reposed the highest trust in you, as an American, an attorney and as a jurist.

As you are very much aware, your nomination was greeted with what might be called mixed reviews, and quite frankly from information which has come to my attention it appears that President Reagan may have been misled by a July 7, 1981, report prepared by a senior Justice Department official. The report to which I refer has been thoroughly dissected by those in opposition to your nomination and while perhaps not dispositive of the issue, these analyses raise legitimate concerns in the minds of many with respect to your attitudes on such issues as abortion, the proposed Equal Rights Amendment, and your record while in the Arizona Senate. Moreover, if the memorandum is to be accepted at full value, then certain questions with respect to your credibility are apparent.

While I realize that people of good conscience can be in favor of abortion under certain circumstances, I firmly believe that this government is founded upon respect for the dignity of human kind, and that in my view those Americans who favor what has come to be known as "Pro-choice" abortion undermine this basic concept.

In my previous conversation with you I told you that I had not made a decision as to how I would vote on your nomination. I have still not made a decision. My judgment will be based on information which I have developed prior to these hearings together with my evaluation of your responses to questions put to you at the hearings. After all, the purpose of these hearings is not merely to confirm you, but to find out who you really are and what convictions you possess on great issues. The fact that you are a woman must not, in and of itself, dictate the result. We as Senators must fulfill our role of advising and consenting to the nomination of judges of the Supreme Court as set forth in Art. II, Section 2 of the Constitution. We cannot merely acquiese in the selection of President Reagan no matter how highly we regard him and the quality of his leadership.

In closing let me say that it is my earnest hope that your responses will be neither broad nor bland, as a lack of knowledge or lack of specificity in answers could easily be perceived as a lack of qualification or of candor.

THE O'CONNOR SUPREME COURT NOMINATION, A CONSTITUTIONAL LAWYER COMMENTS

(By William Bentley Ball)[1]

As one whose practice is in the field of constitutional law, one thing stands out supremely when a vacancy on the Supreme Court occurs: the replacement should be deliberate, not impulsive. The public interest is not served by a fait accompli, however politically brilliant. The most careful probing and the most measured deliberation are what are called for. Confirm in haste, and we may repent at leisure.

Unhappily, the atmosphere surrounding the nomination of Sandra Day O'Connor to the Supreme Court is one almost of panic. Considering that the liberties of the American people can ride on a single vote in the Supreme Court, any politically or ideologically motivated impatience should be thrust aside and time taken to do the job right. Plainly, there is no need for instanteous confirmation hearings, and the most painstaking effort should be made to fully know the qualifications—including philosophy—of the candidate. My first plea would be, therefore: Don't rush this nomination through.

My second relates indeed to the matter of "philosophy". Some zealous supporters of the O'Connor nomination (who themselves have notoriety as ideologues) have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say, in other words, that it should be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

Philosophy is everything in dealing with the spacious provisions of the First Amendment, the Due Process Clauses, equal protection and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when, in these vital areas of the Constitution, there is really very little language to "strictly" construe. As to other areas of the constitution (e.g., Article 1, Sect. 4—"The Congress shall assemble at least once in every year . . ."), to speak of "strict construction" is also absurd, since everything is already "constructed".

It is likewise meaningless to advance a given candidate as a "conservative" (or as a "liberal"). In the matter of Mrs. O'Connor, the label "conservative" has unfortunately been so employed as to obfuscate a very real issue. The scenario goes like this:

Comment: "Mrs. O'Connor is said to be pro-abortion."

Response: "Really? But she is a staunch conservative."

Just as meaningful would be:

Comment: "John Smith is said to be a mathematician."

Response: "Really? But he is from Chicago."

Whether Mrs. O'Connor is labeled a "conservative" is irrelevant to the question respecting her views on abortion. So would it be on many another subject.

The *New York Times* editorialized July 12 on "What To Ask Judge O'Connor". The four questions it posed (all "philosophical", by the way) were good. To these many another question need be added. For example:

What are the candidate's views on:

The proper role of administrative agencies and the assumption by them of powers not clearly delegated?

The use by IRS of the tax power in order to mold social views and practices?

The allowable reach of governmental control respecting family life?

Busing for desegregation?

The proper role of government with respect to non-tax supported, private religious schools?

Sex differentiation in private employments?

Freedon of religion and church-state separation?

Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too—and important—would be questions to the candidate calling for agreement with, disagreement with, and discussion of, major prior decisions of the Supreme Court. Not the slightest impropriety would be involved in, and much could be gained by, public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made.

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[1] Former chairman, Federal Bar Association Committee on Constitutional Law.

Even these few considerations make it clear that the Senate's next job is not to confirm Mrs. O'Connor but instead to find out who she really is—that is, what convictions she possesses on great issues. I thus return to my theme that deliberativeness, not haste, should be the watchword respecting the confirmation inquiry. The fact that a woman is the present candidate must not (as Justice Stewart indicated) be dispositive of choice. It should certainly not jackknife basic and normal processes of selection. At this point, no prejudgment—either way—is thinkable.

Other vacancies may soon arise. The precedent of lightning-fast decisions in the matter of choosing our Supreme Court Justices would be a bad precedent indeed.

The CHAIRMAN. Senator Specter of Pennsylvania.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. In exercising the Senate's prerogative to advise and consent, I think we should evaluate Judge O'Connor on her capacity to interpret the Constitution with respect to the legal issues that will confront the next generation as well as this generation.

Among the many difficult matters facing our society, none is more important than bridging the "generation gap." The genius of our Constitution is that it provides a framework for government spanning generations, eras, centuries—which depends on the quality of judicial construction that is up to this tough task.

Judge O'Connor, if confirmed at age 51, is likely to have a pivotal part in applying the Constitution 10 years from now in 1991, 20 years from now in 2001, and perhaps even 30 years from now in 2011.

No one said it better than Justice Holmes in *Abrams* v. *United States,* in 1919, when he wrote: "Time has upset many fighting faiths." As highly charged and important as the issues of today are, and there are many which fit that description, there will be totally unpredictable matters which could confront this prospective Justice in the next two decades and beyond into the 21st century. Accordingly, as I see it, our task is to confirm a Justice who has the intelligence, training, temperament, and judgment to span that generation gap.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The President of the United States has designated the distinguished Attorney General of the United States, William French Smith, to present his nominee, Sandra Day O'Connor, to the Senate Judiciary Committee. I now request the Attorney General to present the nominee to the Judiciary Committee.

STATEMENT OF HON. WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General SMITH. Mr. Chairman and members of the committee, I am very pleased on behalf of the President to present Judge Sandra Day O'Connor to this committee and to the Senate, his nominee for the position of Associate Justice of the Supreme Court of the United States.

In assisting the President with this nomination, in the weeks before and the weeks after he made his decision, I had the occasion to become quite well acquainted with Judge O'Connor as a jurist, as a scholar, as a person, and as a friend. I can certainly say that I consider her to be highly qualified for this most important post.

Throughout her career she has exemplified the quality of judicial restraint which is most essential to the functioning of our form of government. She has also demonstrated a very strong commitment to the critical role that the States play in our Federal system.

This is a very proud day for me personally, as it is for the President and for the administration. We went out to find the very best and, as I am confident you will see, we think we have done just that with Judge Sandra Day O'Connor.

Thank you.

The CHAIRMAN. Thank you.

We will now hear from the distinguished Senator from Arizona, the senior Senator, Senator Barry Goldwater.

STATEMENT OF HON. BARRY GOLDWATER, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator GOLDWATER. Mr. Chairman, members of the committee, I am delighted and honored to have this opportunity to introduce to you Judge Sandra O'Connor and to declare my unqualified endorsement of her nomination to the U.S. Supreme Court.

Mrs. O'Connor is a very fine judge. She has a legal and political background, and is extremely well-admired in Arizona. Judge O'Connor has done far more for the community than most women or most men, and has received many awards from civic and religious groups. She has been married for 29 years, raised three sons, and you could not find a more family-oriented person than she is.

During these hearings, I think you will find Judge O'Connor to have a deep love of our Constitution and a strong attachment to the first principles that secure our liberties and form our unique contribution to the science of government. Judge O'Connor's balanced background enables her, more than most people, to appreciate and understand the concepts and values which underlie both the law and constitutional government.

As a former trial judge, Mrs. O'Connor has the technical ability to know what a civil or criminal proceeding is all about. In her present position as a judge on the appeals court, she has demonstrated proven competence in reviewing lower court decisions. As a State court judge, Mrs. O'Connor brings a perspective to the U.S. Supreme Court that is important to our federal system; and as a former legislator, she comprehends the full meaning of representative government.

Mr. Chairman, I have been acquainted with the O'Connor family for many, many years. I know the Nation will be well-served if your committee votes favorably on her nomination.

Mr. Chairman, because Congressman John Rhodes has been detained in Arizona, he has asked me to ask you to insert in the record his statement relative to Judge O'Connor, and I thank you.

The CHAIRMAN. Without objection, the statement will be inserted in the record.

[Material to be supplied follows:]

Statement
by
Congressman John J. Rhodes
before the
Senate Committee on the Judiciary
on
The nomination of Mrs. Sandra Day O'Connor
as an
Associate Justice of the U.S. Supreme Court

Mr. Chairman and Members of the Committee, I want to thank you for this opportunity to voice my support of the nomination of Mrs. Sandra Day O'Connor to serve as an Associate Justice on the United States Supreme Court.

It is fitting that an individual of Judge O'Connor's high standards and eminent qualifications was nominated for this critically important position. Having served as Arizona's Assistant Attorney General; in the State Senate; as a Superior Court Judge; and as a presiding judge on the Arizona Court of Appeals, she is, indeed, as the President so aptly noted, a person for all seasons.

It is important to note that during these years of public service, Judge O'Connor has served with distinction in a number of responsible positions outside of government. She has been a member of Stanford University's Board of Trustees and is currently President of the Board of Directors of the Heard Museum and a member of the Board of Directors of the Phoenix Historical Society.

Judge O'Connor's supporters represent a wide spectrum of political and philosophical viewpoints -- a living testimony to her capabilities and to her equitable approach to jurisprudence.

As the first woman to be nominated to serve on the Supreme Court, it is a historic occasion and one of immense satisfaction to all who applaud the President's action. The Senate now has an opportunity to participate in this auspicious event.

Our country has experienced many significant changes during its 200-year history, and ratification of this nomination will join the list of exceptional milestones. I urge the Committee to act favorably on this matter.

The CHAIRMAN. The distinguished junior Senator from Arizona, Mr. DeConcini.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, my fellow colleagues of the Judiciary Committee, it is a great pleasure to join with you and to join Senator Goldwater today in introducing Sandra Day O'Connor to the U.S. Senate Judiciary Committee for confirmation as an Associate Justice to the U.S. Supreme Court. It is with a sense of history that I find myself presenting to this committee Judge O'Connor, who I believe is about to become the first woman Justice on the U.S. Supreme Court.

Judge O'Connor's qualifications are not that she is a woman, although it is certainly long past due that the Supreme Court has its first woman. In fact, the Supreme Court should have more than just one woman.

Judge O'Connor's qualifications are many. She has distinguished herself as a judge both at the trial court level and at the appeals court level; as a legislator, where she served as majority leader of the Arizona State Senate and as chairman of one of the major committees; as an attorney, both in private practice and in public service; and as an active private citizen who is willing to devote her time for the benefit of the public as a member of the National Board of the Smithsonian Associates and as president of the board of trustees of the Herd Museum in Phoenix, as well as a long list of public and private service organizations too lengthy to go into today.

It should be noted that she has served in the executive, legislative, and judicial branches of Government with distinction. She has gained from those experiences an invaluable insight of how each of those branches of Government work, which will serve her in good stead as a member of the Supreme Court. In addition, her public service and private legal experience gives her an extremely broad-based foundation for a truly outstanding career on the Supreme Court.

I have had the unique benefit of knowing of Judge O'Connor's qualifications firsthand but I am certain that by the termination of these hearings you, my fellow members of the Judiciary Committee, will be as convinced as I am that Judge O'Connor will make a superb Supreme Court Justice and should be confirmed.

At this time I would like to congratulate President Reagan for nominating an outstanding candidate and for recognizing after all the many, many years that there certainly should be a woman sitting on the Supreme Court, and there will be.

My personal experience with Judge O'Connor's legal ability occurred when she was the assistant attorney general assigned to advise the Governor of the State of Arizona, and I at the time was the Governor's administrative assistant during the period 1965–66. She was a Republican legal counsel for a Democratic Governor. That situation many times creates problems that are frequently unsolvable and that make relations unworkable but not with Sandra O'Connor.

To her credit, she was always hard-working, fair, intelligent, conscientious, and I have to admit, correct. Her reputation was outstanding. Her friends admired her for her ability and her hard work. Her foes, although in disagreement with her sometimes, always admitted that she was a true professional. Any criticism of her today will not be directed toward her reputation, simply because that reputation is beyond reproach. She exhibits consummate traits that are necessary for a professional, traits that will stand her in good stead when she is sworn into and becomes a member of the U.S. Supreme Court.

When Justice Potter Stuart resigned from the Supreme Court, I recommended that Judge O'Connor be considered for that very important appointment. Again, even though we are of different political parties it is necessary that we overcome any political, partisan differences when appointments to the U.S. Supreme Court are concerned. Therefore, as a Democrat I heartily commend a Republican appointment and the superb Justice that Sandra O'Connor will make. At a time like this, partisanship should be shelved. I think you will see by the wholehearted support of the Arizona delegation that certainly is not a question.

A gage of her reputation is contained in a document entitled "House Concurrent Memorial 2001" commending President Reagan on his nomination of the Honorable Sandra Day O'Connor to the U.S. Supreme Court and urging the U.S. Senate to swiftly confirm her nomination.

The memorial was passed with only three negative votes in the two bodies of the Arizona Legislature, which consists of 90 men and women. The memorial was passed with the almost total support of Republicans and Democrats, liberals and conservatives, pro-life and pro-choice proponents. These are the people that have worked with her and know her integrity and her ability. I am inserting in the record a copy of that memorial for the committee's consideration.

Sandra is not just an outstanding professional, however. She is accompanied here today by her husband, John O'Connor, a prominent Phoenix lawyer; her three sons, Scott, Brian, and Jay; as well as her sister, Ann Alexander and her brother-in-law, former State Senator Scott Alexander, along with many friends from across the country.

Her record as a wife and a mother is commendable. The number and quality of people who are here today from Arizona to testify in Sandra's behalf are equally impressive: In addition to Senator Goldwater, Congressman Morris K. Udall, chairman of the Interior Committee; Congressman Bob Stump, who will have a statement before these hearings are over; Congressman Eldon Rudd; Governor Bruce Babbitt; Arizona State Senate President Leo Corbet, who served in the State senate with Judge O'Connor; Mayor Margaret Hance of Phoenix, the largest city having a woman mayor in the United States; Senator Stan Turley, Arizona State senator who served with Judge O'Connor in the State senate, and who has been a leader in the pro-life movement; Senator Alfredo Gutierrez, former Democratic majority leader of the Arizona State Senate; Representative Donna Carlson West, Arizona House of Representatives member, distinguished, who is a strong pro-life leader; Representative Art Hamilton, the minority leader of the Arizona House of Representatives, who has served with Sandra O'Connor; Representative Tony West, a distinguished member of the Arizona House of Representatives, who is also a strong pro-life leader; Jim McNulty, former State senator who served with Judge O'Connor and is one of the most prominent members of the Arizona Bar Association, and now serves on the board of regents.

In presenting Judge O'Connor to you today, my fellow colleagues, I can only add that she has the extraordinary mix of intelligence, industry, imagination, ingenuity, and integrity that will cause those that are here 50 years from now to comment that Sandra O'Connor was not only the first woman Justice of the U.S. Supreme Court but she was, more importantly, one of the best Justices. May I present Judge O'Connor.

Thank you, Mr. Chairman.

The **CHAIRMAN**. A Senator from West Virginia has made a request to make some remarks. We shall ask the distinguished Senator from West Virginia, Jennings Randolph, to come around at this time.

STATEMENT OF HON. JENNINGS RANDOLPH, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator **RANDOLPH**. Chairman Thurmond and members of the committee, I appreciate the opportunity to appear before the committee on this historic occasion.

For the first time in the 205 years of our Republic's existence, the Senate is called on to judge the qualifications of a nominee to the U.S. Supreme Court who is a woman. I regret that it has taken more than two centuries to acknowledge through this nomination that just as justice should be symbolically blindfolded when determining the facts, we should be oblivious to sex when selecting those who administer justice.

Mrs. Sandra O'Connor appears before you today as the choice of the President of the United States, not solely because she is a woman but because her record appears to qualify her to serve on our Nation's highest tribunal. It would be naive to believe that if Mrs. O'Connor is confirmed as an Associate Justice of the Supreme Court, that her sex will cease to be a factor in her decisions. She will be urged to have feminist rulings; she will be criticized if she makes them or if she resists this pressure.

I look forward to the time when Justices of the Supreme Court are selected and evaluated solely on their experience, their knowledge of the law, and their dedication to the United States as a nation governed by the laws the people impose on themselves.

Mr. Chairman, when Mrs. O'Connor becomes a member of the Supreme Court, she will have succeeded at long last in having a woman occupy virtually every high office our country has to offer. The most notable exception is the White House, and I anticipate the day when the highest office in our land is not exclusively a male preserve.

A breakthrough occurred during the first week in March of 1933. That was the time when I came first to Washington to serve as a Member of the House of Representatives. It was on March 4 of that year that President Franklin D. Roosevelt—I remind you of the day he took office—that he broke another precedent by appointing

Frances Perkins as the first female Cabinet member during the history of our country.

She served for 12 years as Secretary of Labor. She repeatedly—and I speak from experience—demonstrated the wisdom of President Roosevelt's action. Her constructive career made it easier for other women who have subsequently served in the Cabinet.

Mrs. O'Connor, I wish you well, not only during these hearings and the Senate confirmation vote but during the challenging, perplexing years ahead. You will be called on to make many difficult decisions but I am confident you will approach them with a spirit of fairness, justice, and equity.

I thank you, Mr. Chairman and members of the committee.

The **Chairman**. The U.S. House delegation in the Congress is represented today by two of its Members. I shall now call upon them: the first, Congressman Udall.

STATEMENT OF HON. MORRIS K. UDALL, A MEMBER OF CONGRESS FROM THE STATE OF ARIZONA

Congressman **Udall**. Thank you, Mr. Chairman.

I have a short statement to which I have attached a newspaper column that I wrote expressing my strong support for this nominee, and I would ask that it be put in the record.

The **Chairman**. Without objection, that will be done.

Congressman **Udall**. I will be very brief.

Those arranging for Judge O'Connor's hearings today asked me if I would testify and I said—the old cloakroom cliché—"I will testify for or against, whichever would do the most good." [Laughter.]

Apparently, it was decided that my appearance might help, and I hope that is correct. I will try to get Senator Kennedy and Senator Metzenbaum and some of my old allies in the proper frame of mind to vote on this nomination. [Laughter.]

There is an old story about Woodrow Wilson, the last year of his life. Nobody had seen him; it was rumored that he was dead; arguments were made that his wife was really running the country. A group of old Senators demanded to see for themselves his condition. They had opposed Wilson on most things, including the League of Nations.

They were shown to the sickroom, and the leader of the delegation said, "Mr. President, we want you to know that the entire Senate is praying for you," and he said, "Which way, Senator, which way?" [Laughter.]

Therefore, all of us in Arizona are praying for Judge O'Connor. We think it is a good appointment. She has a great judicial temperament. She can be tough but she is gentle. She clearly is conservative but she never has placed partisan political values before justice, and those who practice in her court describe her as a practical, conscientious, fair, open-minded judge.

Mr. Chairman, you will make no mistake in confirming the President's nomination of Judge O'Connor, and I strongly urge that course upon you.

[Material to be supplied follows:]

[From the Washington Post, July 13, 1981]

A MASTER STROKE

"Arizona Judge Sandra O'Connor, Nominated for Supreme Court, Will Be First Woman Justice," the headlines say, and my phone rings a little more these days. "Who is she, what is she like, and what does this mean for the court and for the political future of Ronald Reagan?"

I'll try to shed some light.

I'm a lawyer and a fellow Arizonan, and while I'm not a close friend of the nominee, we are acquaintances. I know her through her reputation and her very successful career in public service and as a community leader.

When people as politically diverse as Barry Goldwater, John Rhodes, Ted Kennedy and I can all support a Supreme Court nominee, it's got to be remarkable. But she will be opposed. The New Right, the Moral Majority and Phyllis Schlafly will go after her with a vengence that is their particular trademark.

Nevertheless, I expect Mrs. O'Connor will, and ought to be, confirmed.

To understand some of what I have to say, you must understand some basic things about the Arizona Republican Party. A moderate Republican friend of mine told me in Tucson not long ago that the party had split into two camps: conservative and very conservative. "The very conservative believe nothing should be done for the first time," he said, "and the conservatives believe that a few things should be done for the first time, but not now."

The point of this is that Sandra O'Connor is a conservative Arizona Republican, but she is a sensible conservative, and in her career in the Arizona Legislature she is said to have had a vote or two that could have been deemed pro-abortion. And she is said to have supported the Equal Rights Amendment early on.

She has a good judicial temperament. She can be tough. She clearly is a conservative, but she has never placed partisan political values before justice. Those who practice in her court describe her as practical, conscientious, fair and open-minded.

Justice Rehnquist, on the other hand, is one of the brightest men I have ever met, but he *is* an ideologue who brings a passionate point of view to every case before him, and that point of view is always conservative. O'Connor has a reputation for treating the law in a businesslike way. She may be a kind of balance-wheel when the "brethren" lock the doors and begin to argue the disposition of important cases.

Arizona, a small state, has produced an amazing number of national candidates, congressional leaders and national spokesmen. I think part of the explanation is that Arizona always has enjoyed a civilized kind of politics. Washington is often confounded at the contrasts, but in Arizona, it's taken for granted. The first woman chief justice of a state supreme court was Lorna Lockwood of Arizona. Sandra O'Connor was the first woman majority leader in a state legislature. Margaret Hance, the mayor of Phoenix, was perhaps the first female big city mayor in the country, or certainly one of the first.

Sandra O'Connor and the Arizona Republicans in the conservative group are not Moral Majority types, but they are conservative when it comes to social and economic issues.

My Democratic friends ought to be grateful for this appointment. It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats. He's going to appoint people to the right of center wherever he can.

The appointment of O'Connor is a master stroke, comparable to Richard Nixon's going to China. It shows a flexibility, a bigness, that the Ronald Reagan sterotype doesn't recognize. It shows a political savvy on the part of the president that I had assumed was not there. I'm certain that women political activists also doubted it was there.

Lyndon Johnson had an opportunity to appoint a woman and didn't. Kennedy had the same opportunity and passed it by. So did Nixon. So did Ford. But Ronald Reagan said he would appoint a woman, and he did.

John East and Jerry Falwell will never say yes to Sandra O'Connor. But that won't matter, because they'll make up with Reagan eventually anyway. Where else would they go?

On the other hand, the president, in one stroke, has deflected criticism from liberals and from women, two of his principal antagonists. Their silence won't last forever, but the edge has been dulled.

Does the appointment of Sandra O'Connor bother me? No, it doesn't. My liberal friends who might be upset fail, I think, to make a distinction between the electoral process and the judicial process. Electing someone who is conservative is one thing, but the process of deciding the controversies that come before the Supreme Court is quite another. In the latter case, it's the ability to understand and apply the law that counts. Sandra O'Connor's competence in this respect is not questioned.

Jerry Falwell and crew are demanding some guarantee that O'Connor will decide cases to their liking, and that's not what the system is all about. Barry Goldwater was right when he said, "I don't buy this idea that a justice of the Supreme Court has to stand for this, that or the other thing." Goldwater understands the constitutional job of the court. I wish Falwell could grasp Barry's meaning.

You can tell a lot about people and even draw a profile by the company they keep and the affiliations they make. Her résumé has these kinds of entries: prosecutor, legislator and state senate leader, civilian employee with the U.S. Army in Germany, juvenile judge, Republican Party official, board of Smithsonian Associates, Salvation Army, Soroptomists Club, Arizona Academy, Junior League, board of Blue Cross-Blue Shield, board of directors of the First National Bank, elected Woman of the Year and recipient of the annual award from the Phoenix Conference of Christians and Jews. And there is much more.

It may be a cliché, but in the case of Sandra O'Connor, she really *is* a pillar of the community. A consistent, decent, hard-working lawmaker, politician, mother, wife, lawyer, public servant and judge.

When one looks at Sandra O'Connor, studies her brand of Republicanism and knows the Republican friends she keeps, it was little wonder that someone in the White House called her "too good to be true."

Like I said earlier, Washington may have been a bit surprised, but out in Arizona, we take the Sandra O'Connors for granted.

The CHAIRMAN. Congressman Rudd of Arizona.

STATEMENT OF HON. ELDON D. RUDD, A MEMBER OF CONGRESS FROM THE STATE OF ARIZONA

Congressman RUDD. Thank you, Mr. Chairman.

Mr. Chairman, distinguished members of the committee, I am very pleased to have this opportunity to appear before this committee today, and also pleased to see you in that seat, Mr. Chairman.

I am glad to express my wholehearted support for the nomination of my constituent, Sandra O'Connor, to be Associate Justice of the Supreme Court of the United States of America. I have known Judge O'Connor for a number of years, as a political campaigner, as a distinguished legislator in the State of Arizona, and as a distinguished jurist in the Arizona court system. I have supported her in her actions in all of these positions.

She has excelled in every task that she has undertaken: as assistant State attorney general, as leader of the State legislature, and as an outstanding jurist in the court of appeals. In all of these positions she has shown devotion to the constitutional processes which govern this Nation, and I am certain that Judge O'Connor will bring the same integrity and the same wisdom to the high court that she did to all branches of the State government of Arizona.

Judge O'Connor is a serious student of the law and her record gives evidence of her strict interpretation of the role of the judiciary. Her varied experiences in government have given depth to her views, and I believe this makes her especially well-qualified for the position. Her nomination is indeed a testimonial to President Reagan's commitment to a stable and responsive government. I urge her confirmation as Associate Justice of the U.S. Supreme Court.

The CHAIRMAN. The Judiciary Committee has received a number of resolutions from various groups, and without objection, they will be placed in the record. Among those are a few I hold in my hand at this time: One by the board of governors of the State Bar of Arizona; one by the board of directors of the Maricopa County Bar

Association; one by the Arizona Judges Association; one by the Arizona State 35th Legislature, Second Special Session, 1981, passed House Concurrent Memorial 2001; one by the Texas State 67th Legislature, First Called Session, 1981, passed House Concurrent Resolution No. 7.

[Resolutions follow:]

RESOLUTION

WHEREAS, The Honorable Sandra D. O'Connor, a member of the State Bar of Arizona and a judge of the Arizona Court of Appeals, has been nominated by the President of the United States as an Associate Justice of the Supreme Court of the United States, subject to the advice and consent of the Senate; and

WHEREAS, Judge O'Connor has continually demonstrated the very highest degree of professional competence and integrity and devotion to the ends of justice both in the State of Arizona and the United States of America as a lawyer and as a trial court judge and judge of the Arizona Court of Appeals: Therefore be it

RESOLVED by the Board of Governors of the State Bar of Arizona that the said Board of Governors unanimously endorse the nomination and appointment of The Honorable Sandra D. O'Connor as an Associate Justice of the Supreme Court of the United States; and be it

RESOLVED further that the President of the State Bar of Arizona be and he is hereby authorized and directed to proceed in an appropriate manner to communicate this endorsement to the Judiciary Committee of the United States Senate, including, but not limited to, an appearance by a representative of the State Bar of Arizona before such committee in support of Judge O'Connor's nomination and appointment.

* * * * * * * * * * * *

The above resolution was unanimously adopted by the Board of Governors of the State Bar of Arizona.

1933

Jack Redhair
President

Attest:

Executive Director

RESOLUTION

On July 13, 1981, the Board of Directors of the Maricopa County Bar Association unanimously passed the following resolution:

> BE IT RESOLVED, that the Board of Directors of the Maricopa County Bar Association is proud to indicate its unanimous support of Sandra Day O'Connor and urges her immediate confirmation as Justice of the United States Supreme Court.

DONE this 13th day of July, 1981.

****

Ralph E. Mahowald

RALPH E. MAHOWALD
President

1946

Superior Court of Arizona
Maricopa County
Phoenix, Arizona
85003

OFFICE OF THE
PRESIDING JUDGE

ROBERT C. BROOMFIELD
PRESIDING JUDGE

August 13, 1981

Hon. Sandra D. O'Connor
Court of Appeals
State Capitol
Phoenix, Arizona 85007

Dear Sandra:

The Arizona Judges Association would like to send a resolution in support of your nomination to the United States Supreme Court if you believe it would be helpful and agree that it should be sent. Enclosed please find a proposed form of Resolution which we tried to keep short enough to be read but long enough to touch upon the important points.

Our purpose is to help. If you believe no resolution should be sent we understand. Likewise, if you believe the language should be altered in any particular that can be done.

Also, the Resolution can be signed by me as President of the Association or left unsigned with a covering transmittal letter, whichever you prefer.

If you agree that the Resolution should be sent we would anticipate sending it to Senator Strom Thurmond as Chairman of the Senate Committee on the Judiciary with copies to Senators Goldwater and DeConcini and the Attorney General. If a different form of transmittal is appropriate or other persons should be sent copies, such as the President, we would certainly be guided by your wishes.

If timing is also a consideration, please let me know.

Sincerely,

Robert C. Broomfield
Presiding Judge

RCB:lp
Enclosure

RESOLUTION

WHEREAS, The Honorable Sandra Day O'Connor has been nominated by the President to become an Associate Justice of the Supreme Court of the United States, and

WHEREAS, Judge O'Connor has served this State as a member of the Arizona Court of Appeals and previously as a member of the Superior Court of Arizona in Maricopa County, and

WHEREAS, Judge O'Connor is held in the highest esteem by her colleagues on the Judiciary of this State, and

WHEREAS, Judge O'Connor's service in the three constitutional branches of government uniquely qualifies her for such a Presidential Appointment, and

WHEREAS, Judge O'Connor has made outstanding contributions to the judiciary and to the public in Arizona by her dedication and tireless committment to providing speedy but fair justice to all litigants, civil and criminal, and by clear, concise and cogent reasoning of her opinions, and

WHEREAS, the Citizenry of Arizona and its Judiciary will decidedly feel the loss of a person of such high regard, competence and integrity, but recognize the gain to be realized by the entire country by her service on the United States Supreme Court, and

WHEREAS, the Arizona Judges Association is a formal Association of all currently sitting Justices of the Supreme Court of Arizona and Judges of the Court of Appeals of Arizona and the Superior Court of Arizona,

NOW, THEREFORE, BE IT RESOLVED that the Arizona Judges Association commends to the Senate of the United States the appointment of The Honorable Sandra Day O'Connor to the Supreme Court of the United States and urges it to advise and consent to her nomination.

OFFICE OF
The Secretary of State
STATE HOUSE
Phoenix, Arizona

ROSE MOFFORD
SECRETARY OF STATE

July 28, 1981

Senator Strom Thurmond
Chairman, Senate Judiciary Committee
Dirksen Building, Room 2226
Washington, D. C. 20510

Dear Senator Thurmond:

The Arizona State Thirty-fifth Legislature, Second Special Session, 1981, passed House Concurrent Memorial 2001, commending President Reagan on his nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court and urging the United States Senate to swiftly confirm her nomination.

The members of the Arizona State Legislature have asked me to transmit the enclosed copy of this Memorial to you for your consideration.

Sincerely,

Rose Mofford

ROSE MOFFORD
Secretary of State

rpm
Enclosure

State of Arizona

Department of State

I, ROSE MOFFORD, SECRETARY OF STATE, STATE OF ARIZONA, DO HEREBY CERTIFY THAT THE ANNEXED DOCUMENT IS A TRUE, CORRECT, AND COMPLETE COPY OF HOUSE CONCURRENT MEMORIAL 2001, THIRTY-FIFTH LEGISLATURE, SECOND SPECIAL SESSION, 1981; THAT I AM THE OFFICIAL OF THE STATE OF ARIZONA IN CUSTODY AND CONTROL OF THE ORIGINAL OF SAID DOCUMENT AND THE LEGAL KEEPER THEREOF.

IN WITNESS WHEREOF I HAVE HEREUNTO SET MY HAND AND AFFIXED THE GREAT SEAL OF THE STATE OF ARIZONA. DONE AT PHOENIX, THE CAPITAL, THIS 27TH DAY OF JULY, 1981.

Rose Mofford

ROSE MOFFORD
SECRETARY OF STATE

State of Arizona
House of Representatives
Thirty-fifth Legislature
Second Special Session
1981

HOUSE CONCURRENT MEMORIAL 2001

A CONCURRENT MEMORIAL

COMMENDING PRESIDENT REAGAN ON HIS NOMINATION OF THE HONORABLE SANDRA DAY O'CONNOR TO THE UNITED STATES SUPREME COURT AND URGING THE UNITED STATES SENATE TO SWIFTLY CONFIRM HER NOMINATION.

To the President and the Senate of the United States of America:

Your memorialist respectfully represents:

Whereas, President Reagan has displayed great wisdom and foresight in the laudable nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court; and

Whereas, Judge O'Connor is an eminently qualified jurist, having served as a trial court judge and presently serving as an appellate court judge; and

Whereas, Judge O'Connor has obtained extensive experience in many areas of the law as a Deputy County Attorney of San Mateo County in California, as a civilian attorney for the Quartermaster Market Center in Frankfurt/M, West Germany, as an Assistant Attorney General of Arizona and as a private practitioner of law; and

Whereas, Judge O'Connor first distinguished herself as a legal scholar at Stanford University where she served on the Board of Editors of the Stanford Law Review and from which she graduated in the Order of the Coif; and

Whereas, Judge O'Connor served with great distinction in the Legislature of the State of Arizona as a Senator and demonstrated her inherent leadership capabilities as Majority Leader of the Arizona State Senate; and

Whereas, Judge O'Connor has an outstanding record of service and experience in each of the executive, legislative and judicial branches of state government; and

Whereas, Judge O'Connor has willingly and with great devotion and fervor given of herself in the service of her nation and community for

which she was greatly honored as the Phoenix Advertising Club "Woman of the Year" in 1972, the recipient of the National Conference of Christians and Jews Annual Award in 1975 and the recipient of the Arizona State University Distinguished Achievement Award in 1980; and

Whereas, Judge O'Connor also possesses the attributes of an outstanding wife and mother; and

Whereas, Judge O'Connor would take to the United States Supreme Court all of the admirable qualities mentioned above.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the Senate concurring, prays:

1. That President Reagan will take pride in his sensational nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

2. That the United States Senate will act swiftly to confirm the nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

3. That the Secretary of State of the State of Arizona transmit copies of this Memorial to the President of the United States, the President of the United States Senate, the Majority Leader of the United States Senate, the Minority Leader of the United States Senate, the Chairman of the Judiciary Committee of the United States Senate, the members of the Judiciary Committee of the United States Senate and to each Member of the Arizona Congressional Delegation.

Passed the House - July 23, 1981 by the following vote: 51 Ayes, 2 Nays, 7 Not Voting

Passed the Senate - July 24, 1981 by the following vote: 29 Ayes, 1 Nay, 0 Not Voting

Approved by the Governor- July 24, 1981

Filed in the Office of the Secretary of State - July 24, 1981

REFERENCE TITLE: Honorable Sandra Day O'Connor

STATE OF ARIZONA
35th LEGISLATURE
SECOND SPECIAL SESSION

HOUSE

HCM 2001
Introduced
July 23, 1981

Introduced by Representatives West, Kelley, Senator Corbet, Representatives Thomas, Carlson West: Abril, Baker, Barr, Cajero, Corpstein, Courtright, Davis, De Long, Denny, C. Dunn, P. Dunn, English, Everall, Goudinoff, Guerrero, Hamilton, Hanley, Harelson, Hartdegen, Hawke, Hays, Higuera, Holman, Hull, Hungerford, Jennings, Jewett, Jones, Jordan, Kenney, Kline, Kunasek, Lane, Lewis, Macy, McConnell, McCune, McElhaney, Meredith, Messinger, Morales, Pacheco, Peaches, Ratliff, Rockwell, Rosenbaum, Sossaman, Thompson, Todd, Vukcevich, Wettaw, Wilcox, Wright, Senators Alston, Gabaldon, Getzwiller, Gonzales, A. Gutierrez, J. Gutierrez, Hardt, Hill, Hubbard, Kay, Kimball, Kolbe, Lindeman, Lunn, Mack, Mawhinney, Osborn, Pritzlaff, Rottas, Runyan, Sawyer, Steiner, Swink, Taylor, Turley, Usdane, Weeks

(With permission of Committee on Rules)

A CONCURRENT MEMORIAL

COMMENDING PRESIDENT REAGAN ON HIS NOMINATION OF THE HONORABLE SANDRA DAY O'CONNOR TO THE UNITED STATES SUPREME COURT AND URGING THE UNITED STATES SENATE TO SWIFTLY CONFIRM HER NOMINATION.

To the President and the Senate of the United States of America:

Your memorialist respectfully represents:

Whereas, President Reagan has displayed great wisdom and foresight in the laudable nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court; and

Whereas, Judge O'Connor is an eminently qualified jurist, having served as a trial court judge and presently serving as an appellate court judge; and

Whereas, Judge O'Connor has obtained extensive experience in many areas of the law as a Deputy County Attorney of San Mateo County in California, as a civilian attorney for the Quartermaster Market Center in Frankfurt/M, West Germany, as an Assistant Attorney General of Arizona and as a private practitioner of law; and

Whereas, Judge O'Connor first distinguished herself as a legal scholar at Stanford University where she served on the Board of Editors of the Stanford Law Review and from which she graduated in the Order of the Coif; and

Whereas, Judge O'Connor served with great distinction in the Legislature of the State of Arizona as a Senator and demonstrated her inherent leadership capabilities as Majority Leader of the Arizona State Senate; and

Whereas, Judge O'Connor has an outstanding record of service and experience in each of the executive, legislative and judicial branches of state government; and

Whereas, Judge O'Connor has willingly and with great devotion and fervor given of herself in the service of her nation and community for

which she was greatly honored as the Phoenix Advertising Club "Woman of the Year" in 1972, the recipient of the National Conference of Christians and Jews Annual Award in 1975 and the recipient of the Arizona State University Distinguished Achievement Award, in 1980; and

Whereas, Judge O'Connor also possesses the attributes of an outstanding wife and mother; and

Whereas, Judge O'Connor would take to the United States Supreme Court all of the admirable qualities mentioned above.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the Senate concurring, prays:

1. That President Reagan will take pride in his sensational nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

2. That the United States Senate will act swiftly to confirm the nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

3. That the Secretary of State of the State of Arizona transmit copies of this Memorial to the President of the United States, the President of the United States Senate, the Majority Leader of the United States Senate, the Minority Leader of the United States Senate, the Chairman of the Judiciary Committee of the United States Senate, the members of the Judiciary Committee of the United States Senate and to each Member of the Arizona Congressional Delegation.

State of Arizona
House of Representatives
Thirty-fifth Legislature
Second Special Session
1981

HOUSE CONCURRENT MEMORIAL 2001

A CONCURRENT MEMORIAL

COMMENDING PRESIDENT REAGAN ON HIS NOMINATION OF THE HONORABLE SANDRA DAY O'CONNOR TO THE UNITED STATES SUPREME COURT AND URGING THE UNITED STATES SENATE TO SWIFTLY CONFIRM HER NOMINATION.

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Whereas, Judge O'Connor is an eminently qualified jurist, having served as a trial court judge and presently serving as an appellate court judge; and

Whereas, Judge O'Connor has obtained extensive experience in many areas of the law as a Deputy County Attorney of San Mateo County in California, as a civilian attorney for the Quartermaster Market Center in Frankfurt/M, West Germany, as an Assistant Attorney General of Arizona and as a private practitioner of law; and

Whereas, Judge O'Connor first distinguished herself as a legal scholar at Stanford University where she served on the Board of Editors of the Stanford Law Review and from which she graduated in the Order of the Coif; and

Whereas, Judge O'Connor served with great distinction in the Legislature of the State of Arizona as a Senator and demonstrated her inherent leadership capabilities as Majority Leader of the Arizona State Senate; and

Whereas, Judge O'Connor has an outstanding record of service and experience in each of the executive, legislative and judicial branches of state government; and

Whereas, Judge O'Connor has willingly and with great devotion and fervor given of herself in the service of her nation and community for

which she was greatly honored as the Phoenix Advertising Club "Woman of the Year" in 1972, the recipient of the National Conference of Christians and Jews Annual Award in 1975 and the recipient of the Arizona State University Distinguished Achievement Award in 1980; and

Whereas, Judge O'Connor also possesses the attributes of an outstanding wife and mother; and

Whereas, Judge O'Connor would take to the United States Supreme Court all of the admirable qualities mentioned above.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the Senate concurring, prays:

1. That President Reagan will take pride in his sensational nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

2. That the United States Senate will act swiftly to confirm the nomination of the Honorable Sandra Day O'Connor to the United States Supreme Court.

3. That the Secretary of State of the State of Arizona transmit copies of this Memorial to the President of the United States, the President of the United States Senate, the Majority Leader of the United States Senate, the Minority Leader of the United States Senate, the Chairman of the Judiciary Committee of the United States Senate, the members of the Judiciary Committee of the United States Senate and to each Member of the Arizona Congressional Delegation.

Adopted by the Arizona House of Representatives, July 23, 1981, the Senate concurring.

Speaker, House of Representatives

Chief Clerk, House of Representatives

Leo Corbet
President of the Senate

Shirley L Wheaton
Secretary of the Senate

1912

Rose Mofford
Secretary of State

Governor

By Polk H.C.R. No. 7

HOUSE CONCURRENT RESOLUTION

WHEREAS, In an action that fulfilled campaign promises and that will long be noted for its historical significance, President Reagan nominated Sandra Day O'Connor, a highly qualified attorney and state political leader, to serve on the United States Supreme Court; and

WHEREAS, The first woman to be nominated for a Supreme Court position, Mrs. O'Connor has a noteworthy professional background as a graduate of Stanford University's law school, member of the Arizona attorney general's staff, and majority leader of the Arizona state senate; and

WHEREAS, Mrs. O'Connor is a native of El Paso who attended the Radford School for girls and graduated from El Paso's Austin High School when she was 16 years old; she is widely respected, not only for her impeccable legal research and documentation skills, but also for her strong organizational abilities and for her insistence on preparation and perfection; and

WHEREAS, Mrs. O'Connor is an outstanding choice for Supreme Court Justice, and President Reagan merits the high praise of all individuals who feel that the continued strength of this nation's judicial system depends greatly on a Supreme Court that exemplifies high intellectual, educational, and legal quality and racial and sexual equality; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That the 67th Legislature, 1st Called Session, hereby commend President Ronald Reagan on his appointment of Sandra Day O'Connor to the United States Supreme Court; and, be it further

RESOLVED, That official copies of this resolution be prepared and forwarded to President Reagan, to Texas Senators John Tower and Lloyd Bentsen, and to Mrs. O'Connor as expressions of the sentiment of the Texas Legislature.

Clayton
Adkisson
Agnich
Allee
Atkinson
Barrientos
Barton
Benedict
Berlanga
Blanton
Blythe
Bock
Bomer
Brookshire
Browder
Bryant
Buchanan
Burnett
Bush
Cain
Cary
Ceverha
Clark of Smith
Clark of Jasper
Cockerham
Cofer
Colbert
Coleman
Collazo
Coody
Craddick
Crawford
Criss
Danburg
Davis
DeLay
Delco
Denton
Edwards
Eikenburg
Elizondo
Emmett
Evans
Finnell
Florence
Fox
Garcia of Hidalgo
Garcia of Bexar
Gaston
Gavin
Geistweidt
Gibson of Johnson
Gibson of Ector
Gilley
Glossbrenner
Gonzales
Green
Grubbs
Hackney
Haley
Hall of Tarrant
Hall of Webb
Hanna
Hartung
Heatly
Henderson
Hernandez
Hill of Dallas
Hill of Travis
Hinojosa
Hollowell
Horn
Hudson
Jackson
Jones
Keese
Keller
Khoury
Kubiak
Laney
Lee of Cameron
Lee of Harris
Leonard
Lewis
London
Luna
Lyon
McBee
McFarland
McLeod
McWilliams
Madla
Maloney
Martin
Messer
Moreno
Nabers
Nowlin
Oliveira
Patrick
Patterson
Pennington
Peveto
Pierce
Polk
Polumbo
Presnal
Price
Ragsdale
Rains
Rangel
Reynolds
Riley
Robnett
Rudd
Salinas
Saunders
Schlueter
Schoolcraft
Semos
Sharp
Shaw
Simpson
Smith of Dallas
Smith of Harris
Smith of Travis
Staniswalis
Sutton
Tejeda
Thompson of Taylor
Thompson of Harris
Tow
Turner
Uher
Valles
Von Dohlen
Vowell
Waldrop
Wallace
Ware
Washington
Watson
Webber
Whaley
Whitmire
Wieting
Willis
Wilson
Wolens
Wright

H.C.R. No. 7

W P Hobby
President of the Senate

Bill Clayton
Speaker of the House

I certify that H.C.R. No. 7 was adopted by the House on July 20, 1981, by a non-record vote.

Betty Murray
Chief Clerk of the House

I certify that H.C.R. No. 7 was adopted by the Senate on July 20, 1981.

Betty King
Secretary of the Senate

APPROVED: 7-30-81
Date

W.P. Clements Jr.
Governor

The **Chairman**. Judge O'Connor, the time has now come for you to testify. Will you stand and be sworn?

Raise your right hand.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **O'Connor**. I do.

The **Chairman**. Judge O'Connor, we will now give you the opportunity to present an opening statement if you care to do so.

TESTIMONY OF HON. SANDRA DAY O'CONNOR, NOMINATED TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge **O'Connor**. Thank you, Mr. Chairman. I would like to do so, with your leave and permission.

Mr. Chairman and members of the Senate Judiciary Committee, I would like to begin my brief opening remarks by expressing my gratitude to the President for nominating me to be an Associate Justice of the U.S. Supreme Court, and my appreciation and thanks to you and to all the members of this committee for your courtesy and for the privilege of meeting with you.

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, and I happily share the honor with millions of American women of yesterday and of today whose abilities and whose conduct have given me this opportunity for service. As a citizen and as a lawyer and as a judge, I have from afar always regarded the Court with the reverence and with the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of insuring that basic constitutional doctrines will always be honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the U.S. Supreme Court that we all turn when we seek that which we want most from our Government: equal justice under the law.

If confirmed by the Senate, I will apply all my abilities to insure that our Government is preserved; that justice under our Constitution and the laws of this land will always be the foundation of that Government.

I want to make only one substantive statement to you at this time. My experience as a State court judge and as a State legislator has given me a greater appreciation of the important role the States play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the State and the Federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

If confirmed, I face an awesome responsibility ahead. So, too, does this committee face a heavy responsibility with respect to my nomination. I hope to be as helpful to you as possible in responding to your questions on my background and my beliefs and my views. There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supremv Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This would result in my inability to do my sworn duty; namely, to decide cases that come before the Court. Finally, neither you nor I know today the precise way in which any issue will present itself in the future, or what the facts or arguments may be at that time, or how the statute being interpreted may read. Until those crucial factors become known, I suggest that none of us really know how we would resolve any particular issue. At the very least, we would reserve judgment at that time.

On a personal note, if the chairman will permit it, I would now like to say something to you about my family and introduce them to you.

The CHAIRMAN. I would be very pleased to have you introduce the members of your family at this time, Judge O'Connor.

Judge O'CONNOR. Thank you, Mr. Chairman.

By way of preamble, I would note that some of the media have reported correctly that I have performed some marriage ceremonies in my capacity as a judge. I would like to read to you an extract from a part of the form of marriage ceremony which I prepared:

> Marriage is far more than an exchange of vows. It is the foundation of the family, mankind's basic unit of society, the hope of the world and the strength of our country. It is the relationship between ourselves and the generations which follow.

This statement, Mr. Chairman, represents not only advice I give to the couples who have stood before me but my view of all families and the importance of families in our lives and in our country. My nomination to the U.S. Supreme Court has brought my own very close family even closer together, and I would like to introduce them to you, if I may.

My oldest son, Scott, if you would stand, please.

The CHAIRMAN. Stand as your names are called.

Judge O'CONNOR. Scott graduated from Stanford two years ago. He was our State swimming champion. He is now a young businessman, a pilot, and a budding gourmet cook.

Now my second son, Brian, is a senior at Colorado College. He is our adventurer. He is a skydiver with over 400 jumps, including a dive off El Capitan at Yosemite last summer. I look forward to his retirement from that activity [laughter] so he can spend more time in his other status as a pilot.

Now my youngest son, Jay, is a sophomore at Stanford. He is our writer, and he acted as my assistant press secretary after the news of the nomination surfaced and did a very good job keeping all of us quiet. If I could promise you that I could decide cases as well as Jay can ski or swing a golf club, I think that we would have no further problem in the hearing.

Finally, I would like to introduce my dear husband, John. We met on a law review assignment at Stanford University Law School and will celebrate our 29th wedding anniversary in December. John has been totally and unreservedly and enthusiastically supportive of this whole nomination and this endeavor, and for that I am very grateful. Without it, it would not have been possible.

I would like to introduce my sister, Ann Alexander, and her husband, Scott Alexander. They live in Tucson, and are the representatives of my close family at this hearing.

Thank you, Mr. Chairman and members of the committee. I would like to thank you for allowing me this time and this opportunity. I would now be happy to respond to your questions.

The CHAIRMAN. We will now have questioning of the nominee by members of the committee. I presume before we go into this, the members of the committee who accompany you there will prefer to return to their seats or elsewhere.

There will be two rounds of questions of 15 minutes each by the respective members of the committee; then, possibly it may be necessary to go a little further.

Judge O'Connor, the chairman will begin by propounding certain questions to you. We have a timing light system here, which will confine each member to 15 minutes. When the light turns yellow, it means we have 1 minute left; when it turns red, it means the time is up and the gavel will fall at that time.

EXPERIENCE IN ALL THREE BRANCHES OF GOVERNMENT

Judge O'Connor, you have been nominated to serve on the highest court in our country. What experience qualifies you to be a Justice of the U.S. Supreme Court?

Judge O'CONNOR. Mr. Chairman, I suppose I can say that nothing in my experience has adequately prepared me for this appearance before the distinguished committee or for the extent of the media attention to the nomination. However, I hope that if I am confirmed by the Senate, and when the marble doors of the Supreme Court close following that procedure, that my experience in all three branches of State government will provide some very useful background for assuming the awesome responsibility of an Associate Justice of the U.S. Supreme Court.

My experience as an assistant attorney general in the executive branch of State government and my experience as a State legislator in the Arizona State Senate and as senate majority leader of that body, my experience as a trial court judge in the Superior Court of Maricopa County and my experience as a judge in the Arizona Court of Appeals in the appellate process, have given me a greater appreciation for the concept and the reality of the checks and balances of the three branches of government. I appreciate those very keenly.

My experience in State government has also given me a greater appreciation, as I have indicated, for the strengths and the needs of our federal system of government, which envisions, of course, an important role for the States in that process.

My experience on the trial court bench dealing with the realities of criminal felony cases and with domestic relations cases and with general civil litigation has taught me how our system of justice works at its most basic level.

I hope and I trust that those experiences are valuable ones in relation to the work of the U.S. Supreme Court as the final arbiter of Federal and constitutional law as it is applied in both the State and the Federal courts throughout the Nation.

The CHAIRMAN. Judge O'Connor, the phrase "judicial activism" refers to the practice of the judicial branch substituting its own policy preferences for those of elected Representatives. Would you comment on this practice in the Federal courts and state your views on the proper role of the Supreme Court in our system of government?

Judge O'CONNOR. Mr. Chairman, I have of course made some written comments about this in the committee's questionnaire, and in addition to those comments I would like to say that I believe in the doctrine and philosophy of the separation of powers. It is part of the genius of our system.

The balance of powers concept and the checks and balances provided by each of the three branches of Government in relation to each other is really crucial to our system. In order for the system to work, it seems to me that each branch of Government has a great responsibility in striving to carry out its own role and not to usurp the role of the other branches of Government.

Certainly each branch has a very significant role in upholding the Constitution. It is not just the judicial branch of Government that has work to do in upholding the Constitution. It is indeed the Congress and the executive branch as well.

It is the role and function, it seems to me, of the legislative branch to determine public policy; and it is the role and function of the judicial branch, in my view, to interpret the enactments of the legislative branch and to apply them, and insofar as possible to determine any challenges to the constitutionality of those legislative enactments.

In carrying out the judicial function, I believe in the exercise of judicial restraint. For example, cases should be decided on grounds other than constitutional grounds where that is possible. In general, Mr. Chairman, I believe in the importance of the limited role of Government generally, and in the institutional restraints on the judiciary in particular.

PERSONAL AND JUDICIAL PHILOSOPHY ON ABORTION

The CHAIRMAN. Judge O'Connor, there has been much discussion regarding your views on the subject of abortion. Would you discuss your philosophy on abortion, both personal and judicial, and explain your actions as a State senator in Arizona on certain specific matters: First, your 1970 committee vote in favor of House bill No. 20, which would have repealed Arizona's felony statutes on abortion. Then I have three other instances I will inquire about.

Judge O'CONNOR. Very well. May I preface my response by saying that the personal views and philosophies, in my view, of a Supreme Court Justice and indeed any judge should be set aside insofar as it is possible to do that in resolving matters that come before the Court.

Issues that come before the Court should be resolved based on the facts of that particular case or matter and on the law applicable to those facts, and any constitutional principles applicable to those facts. They should not be based on the personal views and ideology of the judge with regard to that particular matter or issue.

Now, having explained that, I would like to say that my own view in the area of abortion is that I am opposed to it as a matter of birth control or otherwise. The subject of abortion is a valid one, in my view, for legislative action subject to any constitutional restraints or limitations.

I think a great deal has been written about my vote in a Senate Judiciary Committee in 1970 on a bill called House bill No. 20, which would have repealed Arizona's abortion statutes. Now in reviewing that, I would like to state first of all that that vote occurred some 11 years ago, to be exact, and was one which was not easily recalled by me, Mr. Chairman. In fact, the committee records when I looked them up did not reflect my vote nor that of other members, with one exception.

It was necessary for me, then, to eventually take time to look at news media accounts and determine from a contemporary article a reflection of the vote on that particular occasion. The bill did not go to the floor of the Senate for a vote; it was held in the Senate Caucus and the committee vote was a vote which would have taken it out of that committee with a recommendation to the full Senate.

The bill is one which concerned a repeal of Arizona's then statutes which made it a felony, punishable by from 2 to 5 years in prison, for anyone providing any substance or means to procure a miscarriage unless it was necessary to save the life of the mother. It would have, for example, subjected anyone who assisted a young woman who, for instance, was a rape victim in securing a D. & C. procedure within hours or even days of that rape.

At that time I believed that some change in Arizona statutes was appropriate, and had a bill been presented to me that was less sweeping than House bill No. 20, I would have supported that. It was not, and the news accounts reflect that I supported the committee action in putting the bill out of committee, where it then died in the caucus.

I would say that my own knowledge and awareness of the issues and concerns that many people have about the question of abortion has increased since those days. It was not the subject of a great deal of public attention or concern at the time it came before the committee in 1970. I would not have voted, I think, Mr. Chairman, for a simple repealer thereafter.

The **CHAIRMAN**. Now the second instance was your cosponsorship in 1973 of Senate bill No. 1190, which would have provided family planning services, including surgical procedures, even for minors without parental consent.

Judge **O'CONNOR**. Senate bill No. 1190 in 1973 was a bill in which the prime sponsor was from the city of Tucson, and it had nine other cosigners on the bill. I was one of those cosigners.

I viewed the bill as a bill which did not deal with abortion but which would have established as a State policy in Arizona, a policy of encouraging the availability of contraceptive information to people generally. The bill at the time, I think, was rather loosely drafted, and I can understand why some might read it and say, "What does this mean?"

That did not particularly concern me at the time because I knew that the bill would go through the committee process and be amended substantially before we would see it again. That was a rather typical practice, at least in the Arizona legislature. Indeed, the bill was assigned to a public health and welfare committee where it was amended in a number of respects.

It did not provide for any surgical procedure for an abortion, as has been reported inaccurately by some. The only reference in the bill to a surgical procedure was the following. It was one that said:

> A physician may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing.

That particular provision, I believe, was subsequently amended out in committee but, be that as it may, it was in the bill on introduction.

Mr. Chairman, I supported the availability of contraceptive information to the public generally. Arizona had a statute or statutes on the books at that time, in 1973, which did restrict rather dramatically the availability of information about contraception to the public generally. It seemed to me that perhaps the best way to avoid having people who were seeking abortions was to enable people not to become pregnant unwittingly or without the intention of doing so.

The CHAIRMAN. The third instance, your 1974 vote against House Concurrent Memorial No. 2002, which urged Congress to pass a constitutional amendment against abortion.

Judge O'CONNOR. Mr. Chairman, as you perhaps recall, the *Rowe* v. *Wade* decision was handed down in 1973. I would like to mention that in that year following that decision, when concerns began to be expressed, I requested the preparation in 1973 of Senate bill No. 1333 which gave hospitals and physicians and employees the right not to participate in or contribute to any abortion proceeding if they chose not to do so and objected, notwithstanding their employment. That bill did pass the State Senate and became law.

The following year, in 1974, less than a year following the *Rowe* v. *Wade* decision, a House Memorial was introduced in the Arizona House of Representatives. It would have urged Congress to amend the Constitution to provide that the word person in the 5th and 14th amendments applies to the unborn at every stage of development, except in an emergency when there is a reasonable medical certainty that continuation of the pregnancy would cause the death of the mother. The amendment was further amended in the Senate Judiciary Committee.

I did not support the memorial at that time, either in committee or in the caucus.

The CHAIRMAN. Excuse me. My time is up, but you are right in the midst of your question. We will finish abortion, one more instance, and we will give the other members the same additional time, if you will proceed.

Judge O'CONNOR. I voted against it, Mr. Chairman, because I was not sure at that time that we had given the proper amount of reflection or consideration to what action, if any, was appropriate by way of a constitutional amendment in connection with the *Rowe* v. *Wade* decision.

It seems to me, at least, that amendments to the Constitution are very serious matters and should be undertaken after a great deal of study and thought, and not hastily. I think a tremendous amount of work needs to go into the text and the concept being expressed in any proposed amendment. I did not feel at that time that that kind of consideration had been given to the measure. I understand that the Congress is still wrestling with that issue after some years from that date, which was in 1974.

Thank you, Mr. Chairman.

The CHAIRMAN. Now the last instance is concerning a vote in 1974 against a successful amendment to a stadium construction bill which limited the availability of abortions.

Judge O'CONNOR. Also in 1974, which was an active year in the Arizona Legislature with regard to the issue of abortion, the Senate had originated a bill that allowed the University of Arizona to issue bonds to expand its football stadium. That bill passed the State Senate and went to the House of Representatives.

In the House it was amended to add a nongermane rider which would have prohibited the performance of abortions in any facility under the jurisdiction of the Arizona Board of Regents. When the measure returned to the Senate, at that time I was the Senate majority leader and I was very concerned because the whole subject had become one that was controversial within our own membership.

I was concerned as majority leader that we not encourage a practice of the addition of nongermane riders to Senate bills which we had passed without that kind of a provision. Indeed, Arizona's constitution has a provision which prohibits the putting together of bills or measures or riders dealing with more than one subject. I did oppose the addition by the House of the nongermane rider when it came back.

It might be of interest, though, to know, Mr. Chairman, that also in 1974 there was another Senate bill which would have provided for a medical assistance program for the medically needy. That was Senate bill No. 1165. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother, or where the pregnancy had resulted from rape, incest, or criminal action. I supported that bill together with that provision and the measure did pass and become law.

The CHAIRMAN. Thank you. My time is up. We will now call upon Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

JUDICIAL ACTIVISM

Judge, it is somewhat in vogue these days to talk about judicial activism and judicial intervention, usurpation of legislative responsibility and authority, et cetera.

When those terms are used, and they are—although the chairman did define his meaning of judicial activism—I suspect you would get different definitions of judicial activism from different members of the committee and the academic and judicial professions. One of the things I would just like to point out as this questioning proceeds is that judicial activism is a two-edged sword.

There is the instance where the judiciary determines that although there is no law that the Congress or a State legislature has passed on a particular issue, that there in fact should be one, and the judge decides to take it upon himself or herself to, through the process of a judicial decision, in effect institute a legislative practice.

There is also the circumstance where there are laws on the books that the judiciary has, in a very creative vein, in varying jurisdictions and on the Federal bench, constructed rationales for avoiding. However, today when we talk about judicial activism what comes to mind in almost everyone's mind is the Warren Court and liberal activists.

You are about to be confronted, I would humbly submit, by what I would characterize as conservative activists who do not believe they are being activists; who do not believe that they are in fact suggesting that judges should usurp the power of the Congress; who do not believe that they are suggesting that there should be a usurpation of legislative authority when in fact, I would respectfully submit, you will soon find that that is exactly what they are suggesting.

For example, in your William & Mary Law Review article you discussed the role of the State courts relative to the Federal courts and you believe, if I can oversimplify it, that Federal courts should give more credence, in effect, to State court decisions interpreting the Federal Constitution. You seem somewhat worried about the expansion by the Congress of litigation in the Federal courts under 42 United States Code, section 1983, the civil rights statute.

Then you go on to say, "Unless Congress decides to limit the availability of relief under that statute . . .," and you go from there. I am wondering whether or not you would consider yourself as a judicial activist if on the Court you followed through with your belief—as I understand the article—that there is in fact too wide an expansion of access to the Federal courts under the civil rights statute, whether or not you would implement that belief, absent the amendment by Congress of the civil rights statute to which you referred. Would you be an activist in that circumstance, if you limited access to the Federal courts under the civil rights statutes absent a congressional change in the law?

Judge O'Connor. Senator Biden, as a judge I would not feel that it was my role or function to in effect amend the statute to achieve a goal which I may feel is desirable in the sense or terms of public policy.

Senator Biden. Right.

Judge O'Connor. I would not feel that that was my appropriate function. If I have suggested that Congress might want to consider doing something, then I would feel that it is indeed Congress which should make that decision and I would not feel free as a judge to, in effect, expand or restrict a particular statute to reflect my own views of what the goals of sound public policy should be.

Senator Biden. I thank you for that answer because I fear that—although it probably would be clarified in subsequent questioning—my fear as this hearing began was that we would confuse the substantive issue of judicial activism, usurpation which should be addressed, and which I think has occurred in many instances, with a rigid view of an ideological disposition of a particular judge. A conservative judge can be a judicial activist. A conservative can be a judicial activist, just as a liberal judge could be a judicial activist.

In trying to examine the criteria which should be useds in terms of fulfilling our responsibility as U.S. Senators in this committee under the Constitution, performing our role of advice and consent, a professor at the University of Virginia Law School summarized what he considered to be some of the criteria. Let me just cite to you what his criteria are:

He says first, the professional qualifications are integrity, professional competence, judicial temperament and legal, intellectual, and professional credentials. Second, he mentions the nominee being a public person, one whose experience and outlook enables her to mediate between tradition and change and preserve the best of the social law and social heritage while accommodating law for the change in need and change in perception. Third, she would in some ways provide a mirror of the American people to whom people with submerged aspirations and suppressed rights can look with confidence and hope.

In a general sense, do you agree with those criteria as set out?

Judge O'CONNOR. Senator, I agree that it is important for the American people to have confidence in the judiciary. It appears to me that at times in recent decades some of that confidence has been lacking. I think it is important that we have people on the bench at all levels whom the public generally can respect and accept and who are regarded as being ultimately fair in their determination of the issues to come before the courts. For that reason, judicial selection is a terribly important function at the Federal as well as the State levels.

Senator BIDEN. Judge, in response to the questionnaire you stated—and I think you essentially restated it to the chairman a moment ago—that judges are "required to avoid substituting their own view of what is desirable in a particular case for that of the legislature, the branch of government appropriately charged with making decisions of public policy."

I assume from that you do not mean to suggest that you as a Supreme Court judge would shrink from declaring unconstitutional a law passed by the Congress that you felt did not comport with the Constitution.

Judge O'CONNOR. Senator, that is the underlying obligation of the U.S. Supreme Court. If indeed the case presents that issue, if there are no other grounds or means for resolving it other than the constitutional issue, then the Court is faced squarely with making that decision.

I am sure that such a decision, namely to invalidate an enactment of this body, is never one undertaken by the Court lightly. It is not anything that I believe any member of that Court would want to do unless the constitutional requirements were such that it was necessary, in their view. I think there have been only, perhaps, 100 instances in our Nation's history, indeed, when the Court has invalidated particular Acts of Congress.

Senator BIDEN. There have been many more instances where they have invalidated acts of State legislatures.

Judge O'CONNOR. Yes, that is true.

Senator BIDEN. The second concern I have with your view of what constitutes activism on the Court and of what your role as a Supreme Court Justice would be is that it seems, from the comments by many of my colleagues on both sides of the aisle over the past several years and the comments in the press, that the Supreme Court should not have a right to change public policy absent a statutory dictate to do so.

I wonder whether or not there are not times when the Supreme Court would find it appropriate—in spite of the fact that there have been no intervening legislative actions—to reverse a decision, a public policy decision, that it had 5, 10, 20, or 100 years previously confirmed as being in line with the Constitution.

A case in point: In 1954, after about 60 years and with no major intervening Federal statute, to the best of my knowledge, the Supreme Court said in *Brown* v. *The Board of Education of Topeka* that the "separate but equal" doctrine adopted in the *Plessy* v. *Ferguson* case has no place in the field of public education.

Here is a case where, as I understand it, there was no intervening statutory requirement suggesting that "separate but equal" be disbanded, and where the Court up to that very moment—with a single exception involving a law student and where that law student could sit, to the best of my knowledge—where the Court had up to that time held consistently that "separate but equal" was equal and did comport with the constitutional guarantees of the 14th amendment, then decided that that is no longer right.

They changed social policy; a fundamental change in the view of civil rights and civil liberties in this country was initiated by a court. It was not initiated by a court, it was brought by plaintiffs, but the action of changing the policy was almost totally at the hands of the Supreme Court of the United States.

I wonder, first, whether or not you would characterize that as judicial activism and if so, was it right? If not, if it was not judicial activism, how would you characterize it, in order for me to have a better perception of what your view of the role of the Court is under what circumstances, so that you do not get caught up in the self-proclaimed definitions of what is activism and what is not that are being bandied about by me and others in the U.S. Senate and many of the legal scholars writing on this subject?

Judge O'CONNOR. The *Brown* v. *Board of Education* cases in 1954 involved a determination, as I understand it, by the Supreme Court that its previous interpretation of the meaning of the 14th amendment, insofar as the equal protection clause was concerned, had been erroneously decided previously in *Plessy* v. *Ferguson* so many years before.

I do not know that the Court believed that it was engaged in judicial activism in the sense of attempting to change social or public policy but rather I assume that it believed it was exercising its constitutional function to determine the meaning, if you will, of the Constitution and in this instance an amendment to the Constitution. That, I assume, is the basis upon which the case was decided.

Some have characterized it as you have stated, as judicial activism. The plain fact of the matter is that it was a virtually unanimous decision, as I recall, by Justices who became convinced on the basis of their research into the history of the 14th amendment that indeed separate facilities were inherently unequal in the field of public education. For that reason it rendered the decision that it did.

This has occurred in other instances throughout the Court's history. I am sure many examples come to mind, and I think by actual count they may approach about 150 instances in which the Court has reversed itself on some constitutional doctrine over the years, or in some instances doctrine or holdings that were not those of constitutional dimension.

Senator BIDEN. If I can interrupt you just for a moment, I think you are making the distinction with a difference, and I think it is an important distinction to be made. I just want to make sure that I understand what you are saying, and that is that, as I understand what you are saying, social changes—the postulates that Roscoe Pound spoke of—those societal changes that occur regarding social mores must in some way, at some point, be reflected in the law. If they are not, the law will no longer reflect the view of the people.

It seems as though we should understand that when in fact the legislative bodies of this country have failed in their responibilities—as they did in the civil rights area—to react to the change, the change in the mores of the times, and see to it that that is reflected in the law, on those rare occasions it is proper for the Court to step in.

As Judge Colin Sites of the third circuit said, "It is understandably difficult to maintain rigid judicial restraint when presented with a citizen's grievance crying out for redress after prolonged inaction for inappropriate reasons by other branches of Government."

Judge O'CONNOR. Well, Senator, with all due respect I do not believe that it is the function of the judiciary to step in and change the law because the times have changed or the social mores have changed, and I did not intend to suggest that by my answer but rather to indicate that I believe that on occasion the Court has reached changed results interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision. I was not intending to suggest that those changes were being made because some other branch had failed to make the change as a matter of social policy.

Senator BIDEN. Yes, I am suggesting that. My time is up. Maybe on my second round we can come back and explore that a little more.

Thank you very much, Judge.

The CHAIRMAN. Thank you.

Senator Mathias.

IMPACT OF LEGISLATIVE BACKGROUND

Senator MATHIAS. Thank you, Mr. Chairman.

Taking up, Judge O'Connor, where Senator Biden left off, I seem to recall that Blackstone—if it is not too conservative to quote Blackstone—once said that the law is the highest expression of the ethic of the Nation. Determining exactly what that law is or what that ethic is is, of course, the job that you will face.

One of the frequent tasks of the Supreme Court is to define the intent of Congress, to define the will of Congress in a given legislative expression. Senator Thurmond has pointed out that you will be the first nominee to the Court in 43 years to have had legislative experience. How do you think your legislative background is going to impact on your approach to this particular aspect of the job of a Justice?

Judge O'CONNOR. Well, I think, Senator Mathias, it would impact in much the same way it has in my role as a State court judge. I do well understand, I think, the difference between legislating and judging.

As a legislator it was my task to vote on public policy issues and to try to translate into statutory form certain precepts that were developed as a matter of social or public policy in ways which would then govern the residents of our State.

As a judge it is not my function to continue to try to develop public policy by means of making the law. It is simply my role to interpret the laws which the legislature has passed, to try to do that in accordance with the intent of the framers.

I have discovered that that is not always easy and that sometimes legislators fail to express their intention as clearly as one might like. Sometimes legislators—because all of us are human—fail to think about another situation that might arise that would be impacted by the legislation. Then the judge is left with the duty of trying to interpret the intent as best he or she can in carrying out the apparent intent of the legislature.

Senator MATHIAS. Well, of course, you are right that legislators—and I bear my full share of the responsibility for this—legislators do not always express in their drafting the precise intent of a given statutory enactment, and that casts upon the court an extra burden, a burden both in volume and in the quality of interpretation of law.

However, beyond that question of draftsmanship there is often some doubt in the minds of legislators as to the constitutionality of an enactment. I am sure this never happens in the Arizona legislature but it does occasionally happen around here, that people will say:

> Well, I am not sure whether this is constitutional or not but I think it is a good idea, and therefore I am going to vote for it because there is always the Supreme Court who will make the ultimate decision about the constitutionality.

Now Chief Justice Burger has written that:

> In the performance of assigned constitutional duties, each branch of Government must initially interpret the Constitution, and the interpretation of its power by any branch is due great respect from the others.

Having in mind the fact that we, as legislators, know that sometimes we make a jump in the dark on the constitutional question, how do you feel about Chief Justice Burger's statement?

Judge O'CONNOR. Senator, I appreciate the problem that you are talking about. Indeed, in the Arizona Legislature it was not uncommon that legislators would say, "Well, we have no idea if it is constitutional. Maybe it is not but we are going to pass it anyway." That, indeed, does then move the question along to the judicial branch ultimately.

I agree with what I understand Justice Berger to be saying, to wit, that each branch of Government including the legislative branch has a responsibility and a role in upholding and understanding the Constitution and in attempting to pass laws, if you will, in compliance with the intent of our Constitution. I referred to that earlier in some remarks I made. I think it is very important that each branch of Government carry out its function in preserving and complying and living within the dictates of the Constitution.

Senator MATHIAS. However, that would not prevent you from functioning with too great a respect for the views of the legislative branch if in fact you clearly felt the legislative branch had acted in either ignorance or in error?

Judge O'CONNOR. That is correct, Senator Mathias. If I were convinced, based on research that I did and the briefs and the arguments in a given case, that a particular enactment was unconstitutional, I would so hold.

CONSTITUTIONAL CONVENTION

Senator MATHIAS. Let me ask you a question that may be a little bit unfair because it is very difficult to recall all the votes that you may have cast in your legislative career. I know I would find it very difficult. However, to the best of your recollection, do you recall any votes in which you called for a constitutional convention to revise the U.S. Constitution in any particular?

Judge O'CONNOR. I am not sure that I do. We dealt over the 5-year interval in the Arizona Legislature with literally thousands of measures, and I have learned to do two things in my public life: One is to have a short memory, and the other is to have a thick skin, and they have stood me in good stead on some occasions. [Laughter.]

However, I cannot recall. I do believe, however, that we have had memorials presented during my time in the legislature which did on occasion call for a constitutional convention to address a particular measure, and I may or may not have had occasion to vote on that. At that time I think it was not generally perceived by people to present the kinds of problems that subsequent analysis by scholars has indicated might be the case if that method were pursued.

Senator MATHIAS. I appreciate that answer. Let me say that I am not so much interested in how you may have voted on any particular such memorial or resolution, as I am in whether or not you have considered that question because it seems to me that that question is one of the great unknowns that faces us today.

We are within a few States of a call for a constitutional convention. There is a great void in constitutional law as to exactly how a constitutional convention would be called, would be assembled, or would operate. Now would it be your view, if a constitutional convention were to be called—the closest call right now is on the question of a balanced budget—whether the convention would be limited to just the subject which was the occasion for the call, or could it become a general constitutional convention as happened in 1787 and look to a general revision of the entire Constitution?

Judge O'CONNOR. Senator Mathias, this is one of the intriguing and great questions of contemporary concern, I would say, because indeed as you have pointed out we are quite close to having a sufficient number of requests for a convention to consider an amendment, that consideration of these matters is now important, I think, to the Congress and to people generally.

As you are no doubt aware, in our Nation's history we have not heretofore used the convention method as a method of amending the Constitution. Therefore, we have absolutely no experience to draw upon other than that convention in which our Constitution was originally drafted.

There are a number of scholarly articles which have been written about the question, and as might be expected, the scholars differ greatly in their view of precisely the question you have asked, to wit, whether the scope of the constitutional convention can be limited or not. I think the American Bar Association did a rather thorough study on the question and reached one conclusion. Professors Gunther and van Alstein and others who have written on the subject have reached differing conclusions.

I think it simply is one of the unanswered questions. Indeed, it is even uncertain, I suppose, whether those questions raise political questions which the Supreme Court would ultimately decide or whether they do not.

Senator MATHIAS. In many respects I think that we could all hope that it will remain an unanswered question, and that you will not have to, in your days in the Court, help to provide an answer because the dangers are very real. However, I really wanted to raise the subject with you and to find out if you were troubled as I am by the possibility of a runaway convention that would go far beyond the mandate of its call.

Judge O'CONNOR. Well, Senator, it does of course pose concerns to many people, and as I have indicated, to the best of my knowledge we have no answers.

INDEPENDENCE OF FEDERAL COURTS

Senator MATHIAS. The power of the Federal judiciary has been a very controversial subject since the founding of the Republic. Thomas Jefferson, among others, was very critical of the authority granted to the Federal courts, and so throughout our history there have been periods of attempts to curb the courts, to limit the jurisdiction of the courts.

It has been suggested that Congress should have the power to overrule the constitutional decisions of the Supreme Court, and various devices to dilute or limit the power of Federal judges, attempts to limit jurisdictions of courts.

What impact do you think that proposals of this sort would have on our system of Federal Government as we have known it in our lifetime?

Judge O'CONNOR. If some of the pending proposals were adopted and jurisdiction were limited, Senator, over a given subject matter.

Senator MATHIAS. Well, let me be a little more specific: What impact on the doctrine of judicial independence would be—what do you think would flow from such decisions?

Judge O'CONNOR. Well, article 3 of the Constitution dealing with the judicial branch provides, of course, that we will have one Supreme Court and such inferior courts as Congress shall from time to time establish. That contemplates, I suppose, the capacity of Congress to determine the extent to which we will have lower Federal courts.

I am sure you are aware, also, that it has been held, I believe in the *Palmore* case, that Congress has power to withhold giving all of the jurisdiction to the lower Federal courts that it has authority to give. Congress has traditionally, I think, acted in the field of determining, for instance, statutes of limitations and length of time within which appeals may be filed, and other procedures which do impact directly on the jurisdiction of the Federal courts in one way or another. These have been traditional exercises of that power.

In section 2 of article 3 dealing with the appellate jurisdiction of the Supreme Court, again the Constitution at least refers to such exceptions and regulations as the Congress may impose, and that has not been tested often in the Nation's history. As you know, I think we have the ex parte *McCardle* case in about 1868, and I am not sure that we have much else in the way of case law defining exactly the contemplated power of Congress in that area.

Senator MATHIAS. That is exactly, of course, the point of my question, that there is a certain constitutional grant of specific authority to Congress to erect the Federal courts and generally to provide the guidelines for their jurisdiction. However, does that grant of constitutional power have to be viewed in context with the other provisions of the Constitution, the Bill of Rights included?

Again to be specific, Justice Brandeis referred to separation of powers, and he said that the doctrine of the separation of powers was adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by the means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

How do you view the independence of the Federal courts as a part of that fabric of constitutional government which has to be respected?

Judge O'CONNOR. I do view the independence of the judiciary as an important aspect of our system of checks and balances. I also believe that it was at least contemplated by the framers of the Constitution, perhaps, that the judicial branch would ultimately be in a position to determine what is the supreme law of the land in the sense of interpreting, if you will, the meaning of the Constitution and interpreting, as needed, enactments of Congress.

Now to the extent that that jurisdiction is removed, that function of the judicial branch, I suppose, is no longer performed, or perhaps it freezes into place previous determinations and they simply remain on the books as the last pronouncements. These are issues, of course, that we have not faced directly.

Senator MATHIAS. I would like to pursue this with you a little but we cannot do it at the present time.

Thank you, Judge.

The CHAIRMAN. Thank you.

We had planned to recess at 12:30 until 2:30. We will still come back at 2:30. However, Senator Simpson has an emergency and he has to catch a plane, so the chairman is going to run on beyond 12:30 in order to accommodate Senator Simpson to propound his questions.

Senator Simpson, we will call upon you at this time. In that way, we do not discommode anybody of his regular place. In other words, we are taking that much time out of our lunch hour.

Senator SIMPSON. I do not think I will take the full 15 minutes.

The CHAIRMAN. That is all right. You go right ahead. We are glad to accommodate you.

Senator SIMPSON. Thank you very much. You certainly have always done that, Mr. Chairman, and I am deeply appreciative of it.

I am not going to get into issues about abortion, which is an anguishing personal decision, and those of us who have made public statements on that issue I think at least consistently try to stay with those public statements. I know that when I explained my position on it, it had very seriously been thought through by me with counsel with my remarkable family of a wife and three children too, so I will not delve into that because it is so critically personal.

I certainly recall very well in my legislative experience dealing with riders on bills. That is quite a process in itself, and especially as a majority floor leader in trying to keep a clean bill floating if one could without getting weighted down with riders, so I understand that one.

The issues of the Constitution are so critical to us all as legislators, and I remember so well so many discussions as we legislated, how someone would rise and say, "You cannot do that. That is unconstitutional." This always used to test us on the floor, and then we would say, "Pass it anyway and let the judge decide." I remember that ploy so well.

I was also interested, as Senator Biden was, in your article in the William & Mary Law Journal. There are, I think, 30 opinions of yours that have been reviewed by the examining authorities. Certainly your public commentaries in that article might be the freshest.

NO FINALITY IN THE CRIMINAL JUSTICE FIELD

Now in that there is one thing that I honed in on because it is of great interest to me, and that is trying to reach what I refer to as the "finality of judgment" in this land. I think your comment was that:

> It is a step in the right direction to defer to the State courts and give finality to their judgments on Federal constitutional questions where a full and fair adjudication has been given in the State court.

I think that that is one of the things that has caused us to have such a general reflection of negativism about Federal and State courts, is a lack of finality in judgment, especially perhaps in the criminal field. I mean, how many times can one go on to exhaust due process. We also find this in an area in which I now have come to have a great interest, in immigration and naturalization matters, where we have procedures which, when you are through with them all, you can start over, procedures which do not really give confidence in the judicial system.

Anyway, on this issue of finality of judgment, how do we—given the concept that you state and this need for a determination of full and fair adjudication having been provided in the State courts—my question is, I guess, who would then make that determination? Would that then be a determination made by the Supreme Court? Would that be a request for certiorari upon an already burdened court? What might you share with me as to your view on that and how that might be carried out?

Judge O'CONNOR. Well, Senator Simpson, first of all I think it is a serious concern to a lot of people that there is no finality in the criminal justice field to a given decision, even after an appeal has been heard and resolved, long after the conviction in question, and even after one series of post-conviction petitions for relief, there are others that can be followed in an unending series. I think that is one thing that has caused the public to have some concern about the proper function of the judicial system in that area.

Now how we can attack the problem is something that I think has to be considered by both the courts and the Congress in this field because we are talking about the interrelationship between the State court system and the Federal court system as it relates to Federal constitutional issues. Both the State courts and the Federal courts have a role in determining Federal constitutional issues. State court judges take an oath to support the U.S. Constitution just as Federal court judges do, and there is a reason for that, because many of these issues are first raised at the State court level.

To the extent that we want to permit State court judgments to become final on the question, it then becomes a matter in part of how the Federal courts view the question and in part how Congress views it because each can play a role in saying, "Enough is enough." To the extent that a State court has given a full and fair adjudication on a given issue, even though it may involve a Federal constitutional issue, then perhaps we should be more willing at some point to give finality to that State court determination.

I have seen at least evidence in Supreme Court decisions that would indicate a move in that direction, the cases that have said, "All right, in the 4th amendment area, if there has been a full and fair hearing at the State level we will not grant a Federal habeas corpus to review it." Now that was a holding of the U.S. Supreme Court, in effect.

In addition, Congress could review it. Certainly the present structure requires the Supreme Court to take appellate jurisdiction of certain holdings, and perhaps the Congress would consider making that not mandatory in the future but consider at least whether that should be handled much like other petitions for certiorari are handled. Therefore, I think in response really that both the courts and the Congress could have a role.

Senator SIMPSON. That is of interest to me, I guess because it has piqued my interest as to how we might go about it legislatively, and I guess we will try to look into—and this does not have anything to do with your new duties—but whether there are other methods short of an appeal to the Supreme Court to do this, other than bringing us back virtually to the same position we are in right now with regard to the ready access to the Federal courts through the one instance of the section 1983. Therefore, that is that, and I can visit with you later on that, and I shall.

There was a second point about your article which was thought-provoking to me, and that was a suggestion of a repeal of the Federal statute which would allow attorneys costs to be paid to successful plaintiffs in civil rights cases. In dealing with that, I have I guess a concern as to whether that might not deny access to the courts for some individuals with valid complaints but with, of course, the financial inability to proceed or obtain legal assistance.

Is there any middle ground, in your mind, short of total repeal of that provision that might be acceptable, some modification that would address that issue without cutting off the rights of a potential litigant?

Judge O'CONNOR. Senator Simpson, yes, and I think the point is well-taken. Obviously there are people whose rights have been abused or deprived in some fashion who are entitled to bring suit, and who if they do not have the means to do it need a provision whereby they can recover attorneys fees, else they are not likely to get the kind of legal advice that would be required to get them relief. Therefore, it is understandable that some provision be there.

I think in the article I mentioned that other avenues could be explored short of a total repealer, and so it is not inappropriate then for Congress to look at those provisions in section 1988 and see whether some limitations are appropriate, whether a different set of guidelines to the courts in allowing for attorneys fees would be helpful, something that might discourage the specious claim and the unwarranted one but not ever preclude the valid claim that might be made by the indigent claimant.

Senator SIMPSON. Well, certainly those are some of the problems with any type of public defender system or public prosecutor system, and that is an unfortunate opportunity viewed in some of the minds of my brethren—in my other life I was an attorney—who view that as an ability to raid the treasury of a State or the Federal Treasury.

Finally, just one other question that has to do with what Senator Mathias was referring to, and I guess just a wrap-up in that area with regard to your extensive experience at the State level. I think you bring to the bench or will bring to the Supreme Court Bench a fresh perspective on Federal and State relations which I think has been shunted somewhat in the last two or three decades because simply there is no information to be put into the Supreme Court by those who sit on the Supreme Court, a States' voice issue, if you would.

If I might just ask for you to give me a brief summary as to what general improvements you might see in Federal-State judiciary relationships, what do you see as desirable, and do you see yourself as having a role in bringing that about and bringing it to fruition?

Judge O'CONNOR. Well, Senator, speaking to the last first, I am interested in judicial administration. I have not, of course, had experience in the Federal system, and I have a great deal to learn with regard to the Federal bench and its system.

Certainly I hope that we can always recognize the very great importance that the State court system has in our overall system of justice in this country. Indeed, the vast number of all criminal cases and all other cases, for that matter, are handled in the State court system. That is the system that is doing the bulk of the work, even though I know that you here in the Senate are hearing a great deal about the great pressures that are being experienced in the Federal courts due to their increase in business. However, if you look at it overall it is the State courts that are handling such great bulk of our work.

It is important that those courts function well, that they have capable jurists, that they have an opportunity for training, and I believe in good training of judges. It is possible to go to school and learn something about being a judge, and we have programs like that that are available. They are good programs and merit support.

We have to be mindful of the interrelationship of the State and Federal courts, and I hope give some finality where it is possible to State court decisions, even in the Federal area. That is one of the points that we just discussed, so I think there are ways to improve it. Indeed, the occasion for that issue of the William & Mary Law Review to which you refer was an interesting one which brought together representatives of both the State and the Federal court systems to give an overall view of the problems of the interrelationships and to make some suggestions.

Senator SIMPSON. Well, to me it is an exciting prospect that you bring that additional dimension, which is not really discussed greatly but I think is very important.

Mr. Chairman, thank you for being very gracious to me in recognizing a special problem I have, and I appreciate that very much.

Thank you, Judge.

The CHAIRMAN. We will now stand in recess until 2:30.

[Whereupon, at 1:55 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

After the gavel raps, the press and photographers will withdraw.

Senator Kennedy?

DISCRIMINATION EXPERIENCE

Senator KENNEDY. Thank you very much, Mr. Chairman.

Judge O'Connor, I do not think that there is any question in the minds of millions of Americans that your nomination represents a great victory for equality in our society, and millions of Americans obviously are looking to you with a rightful sense of pride. You have had a long and distinguished legal career.

I would like to ask you whether you have experienced discrimination as a woman over the period of that career and, if so, what shape or form that has taken.

Judge O'CONNOR. Senator Kennedy, I do not know that I have experienced much in the way of discrimination. When I was admitted to law school I was very happy that I was admitted to law school at a fine institution. My only disappointment I think came when I graduated from law school at Stanford in 1952 and looked for a position in a law firm in the private sector. I was not successful in finding employment at that time in any of the major firms with whom I had interviewed.

However, I did then find employment in the public sector. I became a deputy county attorney in San Mateo County, Calif. It was my experience at that time that in the public sector it was much easier for young women lawyers to get a start. It was a happy resolution for me in the sense that I really spent the bulk of my life in the public sector. Therefore, that start turned out to be very beneficial.

DISCREPANCY IN PAY

Senator KENNEDY. You were active in several efforts in Arizona in the State senate to revise employment, domestic relations, and property laws which discriminated against women. I think at that time you pointed out the sharp discrepancies between the pay which men and women often receive for similar work.

As you may have seen, recently there was a report by the EOC about the continued aspects of job discrimination on the basis of sex, and the pay discrepancy is still widespread. Do you find that it is still widespread? Is this a matter of concern to you?

Judge O'CONNOR. It has always been a matter of concern to me. I have spoken about it in the past and have addressed the fact that there does seem to be a wide disparity in the earnings of women compared to that of men.

We know that perhaps a portion of that is attributed to the fact that women have traditionally at least accepted jobs in lower paying positions than has been true for men, and that may be a factor.

When I went to the legislature in Arizona we still had on the books a number of statutes that in my view did discriminate against women. Arizona is a community property State, and the management of the community personal property was placed with the husband, for example. These were things that had been in place for some years. I did take an active role in the legislature in seeking to remove those barriers and to correct those provisions.

Senator KENNEDY. From your own knowledge and perception, how would you characterize the level of discrimination on the basis of sex today?

Judge O'CONNOR. Presently?

Senator KENNEDY. Yes.

Judge O'CONNOR. I suppose that we still have areas from State to State where there remain some types of problems. We know that statistically the earnings are still less than for men. I am sure that in some cases and some instances attitudes still have not followed along with some of the changes in legal provisions.

However, it is greatly improved. It has been very heartening to me as a woman in the legal profession to see the large numbers of women who now are enrolled in the Nation's law schools, who are coming out and beginning to practice law, and who are serving on the bench. We are making enormous changes. I think these changes are very welcome.

Senator KENNEDY. In your response to the committee's questionnaire—I think it is question No. 2—you gave an extensive answer that mentions your concern and involvement in efforts to provide greater equality for women and for many other groups. You specifically mention the legal aid for the poor. You mention the rights of institutionalized persons. You refer to religious nondiscrimination. You mention native Americans. You mention the mentally ill.

However, you do not mention two of the most obvious groups who also have suffered from injustice and inequality; that is, black Americans and Hispanic Americans. I wonder if you briefly would discuss your perception of the degree to which black Americans or Hispanic Americans are denied equality in our society.

Judge O'CONNOR. A great deal of the concern that has been expressed through the courts and in legislation and otherwise in our Nation has been obviously over the situation of blacks. This perhaps has been the worst chapter in our history and one in which great effort has been undertaken to try to correct it.

In our community in Phoenix the black population is basically small, relatively speaking. On the other hand, the Hispanic population in our community is rather large, and it is one which of course is a concern to all of us.

I frankly feel that Arizona has been greatly blessed, Senator Kennedy, with a cultural diversity that we have in that State. I have regarded the Hispanic heritage which we have enjoyed and the Indian American population which we have in Arizona as being one of the great blessings of that State. I think our State at least seems to be working well in relation to trying to eliminate vestiges of discrimination.

Senator KENNEDY. Is it your sense that as a result of continuing discrimination that exists in our society that one of the important priorities is a vigorous enforcement of the civil rights laws that prohibit discrimination?

Judge O'CONNOR. Yes. I think that enforcement of those laws which the Congress has seen fit to enact is a very necessary part of the obligation of both the executive and the judicial branches insofar as those things come before them.

I am sure you recognize that in the case of the judicial branch it does not reach out to seek matters; rather, it receives those cases and controversies that come before it.

Senator KENNEDY. Is there anything special in your background that would indicate a special commitment to equal justice for these two groups? I know that you received some civic awards and have been involved in various societies.

Judge O'CONNOR. Yes.

Senator KENNEDY. I am interested in whether there is anything you would like to mention for the record that would show involvement and personal commitment in these areas.

Judge O'CONNOR. In response to the question I have listed a number of activities in which I personally have been concerned and which are addressed to the attention of the disadvantaged in our society. It has been my effort as a legislator and as a citizen to give my attention to these things. I would expect to always have that concern.

Senator KENNEDY. As you can tell, we are moving from area to area quite quickly in order to cover as much ground as possible. Hopefully, we will be able to come back to some of these questions.

However, in this first round of questions I want to come back to an area which some of my colleagues have talked about. That is the issue of judicial activism. There was some exchange about that during the course of the questioning earlier today.

Some years ago at Justice Stevens' confirmation hearing when I asked him about his view about judicial activism, he commented on the issue. I would like to read it very briefly and then perhaps get your reaction. Perhaps it summarizes or states your view or maybe you would like to make some additional comment.

I quote:

> I think as a judge of course one must decide the cases as they come. One does not really get the opportunity to address the problem in society at large. In a particular case if he has a particular violation of a serious magnitude that gives rise to an extreme remedy, a district judge at his discretion may feel that the way to solve this particular problem is to take some extreme remedial action which would not normally be appropriate, and then the question on appeal is whether he has abused his discretion. Normally one does not find an abuse of discretion. There are many, many cases in which such affirmative remedies are found to be appropriate and would be sustained on appeal.

This is what effectively Justice Stevens told us at his confirmation hearing. I wonder whether you agree with his observation that there are cases where judicial activism in that sense is appropriate as part of a judge's duty.

Judge O'CONNOR. I think we are all aware of school desegregation cases, for example, in which it has become the role and function of the Federal district courts to review the factual situation, and where it has found an intentional or purposeful policy of segregation within the public schools to direct appropriate remedial action if that action is not forthcoming from the school districts or school district itself.

In that connection, the court has on occasion entered a variety of orders for corrective action. I think Justice Stevens has observed correctly that it then becomes the function ultimately of the Supreme Court if an appeal or review is sought to review the action of the Federal district court to see whether any of those orders of the court have amounted to an abuse of discretion.

In that particular area, as you are aware, the Supreme Court has upheld, for example, in the *Swan* v. *County Board of Mecklenberg* case a variety of remedial actions as being possible in the case of the purposeful or intentional policy of segregation.

Senator KENNEDY. That might also include reapportionment cases where there is State or local prison or hospital discrimination as well?

Judge O'CONNOR. There is a variety of cases in which the Federal district court enters orders that might be regarded as affirmative in nature.

Senator KENNEDY. That is effectively to vindicate constitutional rights of the individuals or inmates or patients? That would be, I imagine, the justification for such intervention, would it not?

Judge O'CONNOR. This has occurred.

Senator KENNEDY. In some earlier questions—I think by the chairman—you were asked your position on birth control and abortion. Have your positions changed at all over the years or are they the same as indicated in your votes and statements or comments?

Judge O'CONNOR. I have never personally favored abortion as a means of birth control or other remedy, although I think that my perceptions and my knowledge of the problems and the developing medical knowledge, if you will, has increased with the general explosion of knowledge over the past 10 years. I would say that I believe public perceptions generally about this particular area and problem have increased greatly over the past 10 years. I would have to say that I think my own perceptions and awareness have increased likewise in that interval of time.

Senator KENNEDY. Does that mean your position has altered or changed or just that you have developed a greater understanding and awareness of the problem?

Judge O'CONNOR. The latter I think, Senator, is what I was trying to express.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Laxalt?

EXCLUSIONARY RULE

Senator LAXALT. Thank you, Mr. Chairman.

You have discussed at length judicial activism, social philosophy, and so forth. I think I will spare you that for the next several moments and inquire into something that I deem to be very relevant for any judicial position, particularly the highest court—that is your legal philosophy.

We deal from time to time in this committee in the whole area of criminal law. I have been struck by the broad range of experience that you have had in this area as a judge, and most particularly with some of your rulings.

I would like to ask you about the exclusionary rule, if I may. You have touched on that in a couple of the cases that you have had.

Of course, with a dramatically increasing crime rate and an even greater rise in the number of violent crimes, increasing attention has been given to the laws governing law enforcement. Many of us on this committee happen to believe that perhaps some of the problems we have in connection with crime are procedural.

On that particular matter, in *State* v. *Morgan*—and I am sure you remember that—you ruled that the defendant had waived her right to appeal on the failure to exclude as "fruits of the poisoned tree evidence alleged to have been procured illegally." I agree totally with that result.

As a matter of policy, do you believe that the exclusionary rule may be too narrow, overprotecting the rights of defendants while impeding the ability of the law enforcement people to enforce the law? I am talking about as a matter of general legal philosophy.

Judge O'CONNOR. Senator Laxalt, the exclusionary rule, of course, is one that has caused general public discontent on occasion with the function of the criminal justice system, to the extent that perfectly valid, relevant evidence is excluded solely on the basis that it was obtained in violation of some occasionally technical requirement.

I am sure that none of us would feel that a policy of encouraging the gathering of evidence by peace officers by the use of force, threats, or conduct of that kind is one which the courts would want to condone. On the other hand, we are seeing a number of cases today where the lower Federal courts are beginning to look at the exclusionary rule and the specific factual situation in that case—for example, in the case of evidence obtained by a peace officer in the mistaken belief that he held a valid warrant or evidence obtained in the mistaken belief that a particular case that had been previously decided was still valid law and it is subsequently overturned. We have seen examples in the Federal courts where under those circumstances the exclusionary rule is no longer being applied.

Senator LAXALT. Do you agree with that result? Do you agree with that construction?

Judge O'CONNOR. Let me say, first of all, that some of those things are going to come before the Supreme Court, Senator Laxalt. I certainly would not want to be accused of prejudging an issue that will come before the Court, as indeed I think that this one will.

I simply would like, if I may, to point out what I see as some trends and make some other observations about it.

There are other instances where peace officers who are acting in good faith, but in a mistaken belief as to the existence of certain facts, have taken evidence. We have instances, for example, in the fifth circuit where the fifth circuit has taken the position that that kind of a good faith mistake will not give rise to the application of the exclusionary rule to exclude the evidence. That has not been either approved or disapproved I believe by the U.S. Supreme Court. It is very likely to come before the Court.

As you point out, I have had a good deal of experience at the trial court level and some at the appellate court level with the application of the rule. It is in fact I think a judge-made rule as opposed to one of constitutional dimensions, as I understand it. As a result, the Supreme Court presumably could alter that judge-made rule without doing violence to some constitutional provision or principle.

There have been expressions by several of the sitting Justices that they would like to reexamine that. I think that the rule may well come before the Court and could well be the subject of a reexamination.

Senator LAXALT. Do you think then that there may be a solution in this general area within the judicial system rather than our having to deal with it here legislatively?

Judge O'CONNOR. May I say in response that I had perhaps one of the most unfortunate cases that I had in my years on the trial bench that involved a necessity to apply an exclusionary rule that was the result solely of congressional action, not court action at all. That was an application of one of the provisions of the Uniform Crime Control and Safe Streets Act that required the exclusion in court of evidence obtained that had been overheard on a telephone exchange. In the particular case I had it involved a murder which happened to be overheard by a telephone operator, and that evidence could not be entered. Now that ruling was mandated not by any court action because we were not dealing with peace officers but private individuals. This was something imposed by Congress.

Yes, I think Congress already has enacted laws that affect this and it might want to consider itself some of those aspects.

FEDERAL COURT JURISDICTION

Senator LAXALT. Thank you very much.

Let's talk for a moment or two about Federal court jurisdiction. As you know, we have many social areas in which there is deep division in connection with the principle and certainly in connection with its application.

I think due in great part to the excesses of this Congress in conferring jurisdiction we now have a lot of judges actively engaged in operating prisons, school systems, and the rest, to their chagrin. I communicate with them frequently, and they would rather not be in the business. They would rather be in the business purely of being good judges sitting in their courtrooms or in their chambers rather than having to bother with these other institutions.

Added to all that, of course, we have the problem of our so-called social reforms traditionally enacted in which many feel that the courts did not belong to begin with, but that is the fact. I speak particularly of items such as right to life, abortion, and busing. We deal with that day in and day out. We are going to have a cloture vote on busing tomorrow on the floor.

In order to "obviate" or "circumvent," if that is the proper word, the judicial decision emanating from the highest Court, in the constitutional nature, of course, logically you approach it by way of constitutional amendment, which is a very, very difficult process, first of all, in getting it through the Halls of Congress and then securing ratification out beyond.

Recently there has been some thinking, shared by some of my colleagues on this very committee, that perhaps the way to attack that problem would be to utilize the general power of the Congress constitutionally to limit the jurisdiction of the Federal courts, so that by statute this Congress could define guidelines to exclude the Federal courts from acting in certain areas such as abortion and busing.

May I have from you, if you have had any opportunity to focus on this, your thinking as to what constitutional limits there are upon us as a Congress to limit Federal court jurisdiction?

Judge O'CONNOR. I touched on that briefly this morning, Senator Laxalt.

Senator LAXALT. I know you did.

Judge O'CONNOR. I would review briefly some of those thoughts with you.

You have two separate questions. One is the jurisdiction of the lower Federal courts. That, of course, invokes article 3, section 1. Then we have the appellate jurisdiction of the Supreme Court with article 3, section 2, powers of Congress to regulate, if you will, the appellate jurisdiction of the Supreme Court.

In neither instance do we have much in the way of case law to examine to guide us with respect to the role of the Congress in this area. Certainly to the extent that the judicial branch of Government is supposed to be the ultimate source of determining what is the supreme law of the land, if you will, and the source of resolving conflict among the several Federal courts of the land, and indeed the State courts insofar as their addressing Federal questions is concerned, then we look to the Supreme Court for the capacity to resolve those issues.

To the extent that that capacity were to be withdrawn by the Congress, then it might result in a greater diversity of holdings at the Federal lower court levels or among the State courts. This raises certain policy considerations that I am sure would be of concern to the Congress.

To the extent that a jurisdiction were to be removed, assuming that it can validly be removed, it would leave in place, I suppose, those holdings and doctrines that had already been established by the Supreme Court prior to any removal of jurisdiction of that area.

Now, as I indicated earlier, I think that some of the constitutional scholars who have examined this question are in doubt as to whether indeed it is valid constitutionally for Congress to remove jurisdiction, for instance, of a particular subject matter as opposed to the type of limitation that has heretofore been utilized.

Therefore, to a degree these questions are not answered, although with respect to the appellate jurisdiction of the Supreme Court the *Ex parte McCardle* case in the 1800's upheld as valid a removal by the Congress of the appellate jurisdiction of the Supreme Court in habeas corpus appeals. That affected a pending case before the Court, as a matter of fact.

Not much more is known really about the possibilities. I would say there are some unanswered questions pertaining to these proposals.

Senator LAXALT. What you are saying in effect is, as you indicated, that there really are not any precedents to guide us casewise. If this Congress should see fit in its wisdom, or lack thereof, to move forward in these areas, it is pretty much an open question for later resolution, probably by the Supreme Court itself.

Judge O'CONNOR. Possibly; other than in *Ex parte McCardle* and the *Klein* case, and so forth.

Senator LAXALT. Yes.

How are we doing on time, Mr. Chairman?

The CHAIRMAN. You have a little time left.

STARE DECISIS

Senator LAXALT. All right. I will get into one other area if I may then, Judge. That is the area of stare decisis.

I feel—and I think most lawyers do—the stability of the judicial system rests principally on adhering to precedent. You are going to be presented with that sitting on the Supreme Court I suppose in a greater proportion than you have even been presented with it in the trial court and the appellate court.

Justice Brandeis wrote: "Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right."

May I have your views on this very important principle? I am sure you are familiar with the Justice's observation on stare decisis.

Judge O'CONNOR. Yes, I am, Senator Laxalt.

Senator LAXALT. May I have your views.

Judge O'CONNOR. Stare decisis of course is a crucial question with respect to any discussion of the Supreme Court and its work. I think most people would agree that stability of the law and predictability of the law are vitally important concepts.

Justice Cordozo pointed out the chaos that would result if we decided every case on a case-by-case basis without regard to precedent. It would make administration of justice virtually impossible. Therefore, it plays a very significant role in our legal system.

We are guided, indeed, at the Supreme Court level and in other courts by the concept that we will follow previously decided cases which are in point. Now at the level of the Supreme Court where we are dealing with a matter of constitutional law as opposed to a matter of interpretation of a congressional statute, there has been some suggestion made that the role of stare decisis is a little bit different in the sense that if the Court is deciding a case concerning the interpretation, for example, of a congressional act and the Court renders a decision, and if Congress feels that decision was wrong, then Congress itself can enact further amendments to make adjustments. Therefore, we are not without remedies in that situation.

Whereas, if what the Court decided is a matter of constitutional interpretation and that is the last word, then the only remedy, as you have already indicated, is either for an amendment to the Constitution to be offered or for the Court itself to either distinguish its holdings or somehow change them.

We have seen this process occur throughout the Court's history. There are instances in which the Justices of the Supreme Court have decided after examining a problem or a given situation that their previous decision or the previous decisions of the Court in that particular matter were based on faulty reasoning or faulty analysis or otherwise a flawed interpretation of the law. In that instance they have the power, and indeed the obligation if they so believe, to overturn that previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation.

What I am saying in effect is, it is not cast in stone but it is very important.

Senator LAXALT. It is still a highly persuasive consideration as a matter of principle.

Judge O'CONNOR. Very.

Senator LAXALT. That is all I have for now, Judge. Thank you very much.

Mr. Chairman, I waive the balance of my time, whatever it is.

The CHAIRMAN. Thank you very much.

Senator Byrd is next. I do not believe he is here.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have appreciated the answers you have given here today. I think you have acquitted yourself very well up until now. I fully expect that you will do so not only the remainder of these hearings, but also as a Justice of the U.S. Supreme Court.

Let me just ask one question following up on Senator Laxalt's questioning. I think he asked some very intelligent questions pertaining to judicial philosophy and some of your beliefs.

To pursue his question briefly, how should judges resolve conflicts between precedent or stare decisis and what they perceive to be the intent of the framers of the Constitution?

Judge O'CONNOR. These are very difficult issues for the Court. Obviously the Constitution is the basic document to which the Justices must refer in rendering decisions on constitutional law. In analyzing a question the intent of the framers of that document is vitally important.

Now what does one do as a Justice on that Court faced with a situation in which the Supreme Court itself previously has determined that the Constitution in a given area means a certain thing and that was the intent of the framers and that is the holding of the Court; yet a subsequent Justice believes that interpretation was erroneous and, indeed, that was not the intent of the framers at all but something else was intended? What does that Justice do?

I think we have an example of that kind of situation in the *Brown* v. *Board of Education* case where the then-sitting Justices in 1954 became persuaded that their brethren years previously when *Plushy* v. *Fergusen* and its progeny were decided had incorrectly interpreted the 14th amendment and the intent of the framers of the 14th amendment. They cast their vote and decision to alter that interpretation.

Therefore, it can occur and that is the process that unfolds, although I am sure that in each instance it is a very significant thing for a Justice to overturn precedent, particularly that of long standing.

Senator HATCH. In his famous dissent in *Plushy* v. *Fergusen,* which you mentioned, in 1893 Justice Harlan referred to our Constitution as a colorblind constitution. Would you agree with this characterization?

Judge O'CONNOR. I am aware that Justice Harlan has taken that view, and several other Justices have likewise so characterized it.

On the other hand, we have decisions outstanding of course in the affirmative action area which would indicate that it is not in the view of at least some of the decisions a purely colorblind decision, but that indeed some form of affirmative action is possible in certain areas. Therefore, it is difficult for me to characterize what the Court has done in that respect. I think in some areas it has not applied Justice Harlan's view at this point anyway.

Senator HATCH. Where would you stand on that issue?

Judge O'CONNOR. I am sure that these questions, Senator Hatch, are going to come back before the Court in a variety of forms. I do believe that litigation in the area of affirmative action is far from resolved, as I see it, and that we will continue to have cases in this area. I think it would be inappropriate for me to indicate my specific holding should that matter come before the Court, which I think it will.

FOURTEENTH AMENDMENT

Senator HATCH. I may come back to that issue.

Recent scholarly works with regard to the doctrine of incorporation, including Raoul Berger's famous work, "Government by Judiciary," soundly refute the notion that the authors of the 14th amendment intended to make the Bill of Rights applicable to the States.

Do the Constitution's words and phrases require the first eight amendments to be applied to the States themselves? Is there any justification for that in the legislative history of the 14th amendment?

Judge O'CONNOR. I have not made an indepth study at this point of that legislative history such as you would want to do before casting a deciding vote on a case. I am aware of Raoul Berger's article. In fact, I have read it, and I have read other scholarly works that address themselves to the intent of the drafters of the 14th amendment.

In fact, I think probably there is some difference of opinion which was expressed by the drafters of that 14th amendment at the time. I think Justice Black placed his reliance, for example, on the comments of one or two of those drafters. Mr. Raoul Berger would have felt that those comments were not particularly appropriate.

I am aware of the controversy about the question. We do know, of course, that at this point the Court has held that many of the first 10 amendments are indeed incorporated into the 14th amendment by virtue of its provisions.

TENTH AMENDMENT

Senator HATCH. In regard to the 10th amendment, it discusses "reserved powers." In your opinion what is still reserved to the States?

Judge O'CONNOR. I suppose the 10th amendment was thought by many for some time to be of virtually no further application. We heard very little about it for a long time.

Then I think it gained a lot of notoriety at the time that the Supreme Court handed down its decision in the *Ussury* case, in which basically the Court said that the 10th amendment prohibited the Congress from applying its powers and wage standards to that of State and local employees and held that in that instance it was a violation of the 10th amendment because it affected the States in their role as States.

The attention given the 10th amendment did not last too long I guess because in a succeeding case or two, the *Hodell* case for one, we had occasion to look at some additional enactments of Congress, specifically pertaining to surface mining I believe. The Court did not apply the 10th amendment to invalidate those as they applied to the States, but indeed determined that in those instances Congress really was addressing its attention to private business rather than the States as States.

Therefore, the 10th amendment has had perhaps not a great deal of attention, if you will, in the cases. While we have isolated holdings that have relied on it, we cannot point to any great bulk of authority.

Certainly this has been a great concern to the States because States feel that it is out of the States that the Federal Government grew; that the Federal Government did not create the States but the States formed together to create the Federal Government, and indeed that they did maintain and retain very significant rights.

I could only conclude that perhaps we have not seen the last of the litigation concerning the 10th amendment.

Senator HATCH. You are correct that the Court in the *Usery* case cited the 10th amendment with the proposition that State government employees are beyond Federal Government control for some purposes. I think that was a landmark decision.

Do you think that this is a reinvigoration of the 10th amendment, and really should *Usery* be used as a precedent for future rulings by the Court in your opinion?

Judge O'CONNOR. I am sure that will be cited by many as precedent for future holdings and already has been cited. The extent to which the Court will continue along that path I would say is somewhat uncertain.

STATUTORY INTENT

Senator HATCH. I have been concerned, as you know, about the doctrine of preemption. Under that particular doctrine I think too often the Federal courts have been willing to imply that Congress intended to preempt the whole field of regulation when Congress has not conclusively spoken at all.

Where Congress is silent, when should courts imply a Federal preemption? What limits are there on the use of this doctrine, which I believe is an insidious doctrine?

Judge O'CONNOR. I suppose this involves basically questions of interpretation of statutory intent—the intent of Congress, if you will. There are a number of cases on the books, as you have correctly pointed out, where the courts have determined in essence that Congress has occupied the field fully and therefore the States may no longer exercise any jurisdiction in that particular area.

This, of course, is a matter that has to be addressed on a case-by-case basis. I think quite properly the Court would want to look in each instance at the particular enactment or enactments of Congress that are being said to have occupied the field.

USURPATION OF STATES POWER

Senator HATCH. As you know, I believe the Supreme Court has continually usurped the power of the States and, frankly, has continually invaded the power of the States. It seems to me this is a question you are going to have to be faced with many times in the future as a Supreme Court Justice.

Judge O'CONNOR. I would assume that is true. In approaching problems of statutory interpretation and intent, it has been at least my practice until now, to examine very carefully the legislative history and the language of the particular statute in determining what Congress does intend.

Of course, Congress can be very helpful in that regard by making clear expressions of what it intends. Perhaps it could be therapeutic to consider an expression in the congressional enactment itself that Congress does not intend that this be regarded as occupying the entire field that otherwise States could occupy themselves, or something of that sort.

Senator HATCH. Of course, you know Congress has almost always been necessarily vague. We are not known for legislative draftsmanship in Congress although we should be.

Let me say this to you: During the legislative debate concerning the Civil Rights Act of 1964 many of the proponents said that act would never be used to establish quotas. Yet, in fact, there are many in our society today who feel that is exactly what we have done through the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission. Maybe we will get into that in the next round of questions.

Let me ask you this: The Supreme Court recently upheld a Utah statute requiring parental consent for abortions performed on minors. How would you draw the line between the role of a parent, and a family, and the right to an abortion? If parents have the right to give consent, how about the father of the child? Do you see any inconsistency in giving parents the right to consent but denying the similar protection or privilege to the father of the child?

Judge O'CONNOR. Senator, my recollection of the Utah statute is that it was not one that provided for parental consent but rather for notification to the parents without a consent aspect. In fact, I think that the Supreme Court in an earlier decision had held that a statute from another State which required parental consent for a minor to obtain an abortion was invalid.

I think the more recent case from Utah involved notification to the parents and involved a minor who had not alleged that she was of sufficient maturity, or whatever it was, to make up her own mind or to decide. The Court upheld that particular Utah statute and has drawn a distinction between that and its earlier holdings. I think the Court also has invalidated a requirement in State law that the natural father consent as well.

EXEMPTING WOMEN FROM COMBAT DUTY

Senator HATCH. Let me ask one more question.

You served on DACOWITS, which was the Defense Advisory Committee on Women in the Services, a committee formed by former Secretary of Defense George Marshall in the 1950's to make recommendations on the role of women in the military. One of the recommendations was the right to go into combat ought to be granted to women or at least the law should be removed exempting women from combat duty.

As I understand it, the records in fact show that you exercised leadership in attempting to remove all barriers to the assignment of women to combat vessels. I do not know whether you would be influenced by that fact in reviewing congressional statutes on this subject and the principles the Supreme Court has laid down recently. Do you have any position on that particular matter at this time?

Judge O'CONNOR. Senator, if I could correct some of the statements on that——

Senator HATCH. Yes.

Judge O'CONNOR. I did, indeed, serve on the Defense Advisory Committee on Women in the Service for an interval of time by Presidential appointment. That commission did have occasion to consider a variety of the statutes and regulations governing women in the service.

As you know, the Defense Department had established as a policy that a certain number of women would be admitted in the military service and would serve in the various branches of that service. The DACOWITS commission really was asked then to look into the role of these women and make appropriate recommendation.

During my service on it I did offer suggestions which were adopted by the group and which subsequently were adopted by Congress asking that the statutory definitions, if you will, of combat be reexamined so that we could be more specific as to what jobs and tasks it is that women may appropriately perform and what they may not.

Let me give you an example. At the time that my motion was made women were totally prohibited from serving on ships other than hospital or transport ships. It made no difference whether it was a ship that was in a peacetime mission during peacetime or some other task that did not involve combat at all in the sense that we knew it. It simply was a total prohibition of service by these women on anything but a hospital and transport ship at the same time that the Navy was admitting women to the service and making promotions on the basis of any service that they could have on a ship at sea, so their opportunities were being restricted.

It was suggested that Congress reexamine this prohibition and look instead at the particular mission to be performed and the particular capability of the person to be assigned. That was done. The total prohibition was removed.

I also recommended that the Defense Department and Congress reexamine some of the definitions of combat to make sure that women were not being unnecessarily precluded from appropriate tasks. For example, if we live in an age where we have missile warfare and the task to be performed is one of being engaged in a missile silo in plugging in certain equipment, is that combat—far from the jungles of Vietnam, but rather in the safety of the missile silo? Some of the existing definitions had that effect. It was our suggestion that they be reexamined on a more specific basis. Indeed, that process occurred.

I did not serve on DEACWIS at the time when any recommendation was made to remove totally the prohibition against combat for women.

Senator HATCH. I notice my time is up. Thank you, Mr. Chairman.

ANTITRUST EXPERIENCE

The CHAIRMAN. Senator Metzenbaum?

Senator **Metzenbaum**. Judge O'Connor, I wonder if you would be good enough to tell the committee if you have had any involvement with antitrust issues in your public career.

Judge **O'Connor**. Very little; let me tell you the extent of it, if I may.

When I was in the State legislature I did sponsor and succeed in having passed in Arizona a State antitrust act which was patterned after the Sherman Act. I had occasion as a trial court judge to hear one or two actions, or at least portions of them, which were brought under that act. That is pretty much the extent of it, which is not great experience.

Senator **Metzenbaum**. As you know, the Supreme Court does become the final arbiter of what the antitrust laws of our country are.

Judge **O'Connor**. Right.

Senator **Metzenbaum**. In the landmark *Alcoa* case, Judge Learned Hand wrote a decision that really set out what I believe to be crucial: The whole question of small business and small business being vital to the free enterprise system's being able to operate.

He stated:

> Throughout the history of these antitrust statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake and in spite of possible cost an organization of industry in small units which can effectively compete with each other.

That Judge Hand decision has often been quoted by the Supreme Court. Do you have any difficulty in sharing that view?

Judge **O'Connor**. Senator Metzenbaum, I really do not know what current decisions are pending in the Federal courts in this area. Certainly I recognize that the object of the Sherman Act was to reduce or eliminate monopolies. To that extent, of course it has the effect of encouraging competition and encouraging smaller units to be in operation.

Senator **Metzenbaum**. Let me change to another subject for a moment.

During the last session of Congress we removed impediments to Federal court consideration of all Federal questions regardless of the amount in controversy. That was my bill, as a matter of fact.

In your Wiiliam and Mary article, at page 810, you seem to think that was a bad idea. I just want to get a reading from you as to whether my reading of your writings is correct in view of the fact that repeal of the $10,000 requirement was predicated on the assumption that the smallest litigant was every bit as much entitled to have his or her day in court as the largest litigant, and that the $10,000 requirement no longer made good sense.

On the other hand, you in your article seemed to be criticizing the repeal. You say, "In fact, however, Congress appears to have moved recently to open further the Federal jurisdictional doors." Then you talk about the limitation of the $10,000 amount in controversy.

That concerns me because to me access to the courts, regardless of the economic status of the individual or the size of the case, is a matter of great moment. I would like to be certain that I am interpreting your writings correctly.

Judge O'Connor. I agree with you that access to the courts is vitally important to people regardless of their economic status. The point I was making I think in the article was simply that we have two sets of courts extant in our country. We have State courts and we have Federal courts.

It is my belief that we have certain problems in trying to manage the interrelationship between these two court systems. In fact, I think we are the only country in the world that operates parallel court systems, the Federal court system and a State court system. Of necessity, we have certain problems inherent in the maintenance of these two systems.

People have access now to the State courts for resolution of Federal constitutional issues. That is the point. The Federal issues can be resolved and are being resolved at the State level.

What I was examining here in the article are the trends that I saw in the extension of jurisdiction, if you will, at the Federal level. With all of the problems we have of crowded Federal courts, the need for more judges, and the great problems we have, then what is the trend to expand jurisdiction when these same problems can be heard at the State level?

If they are not satisfactorily resolved at the State level, of course there is a right to go forward and have them resolved at the Federal level if they involve Federal questions. However, if we can have a strong State court system, I would assume that these rights can be properly and fairly addressed at that level. That was the thrust of my concern.

Senator Metzenbaum. Notwithstanding the fact that the Judicial Conference of the United States supported Federal court jurisdiction for all cases arising under a Federal statute or the Constitution, you still feel that it would be more advisable to deny jurisdiction to those who want to use the Federal court system for cases involving amounts less than $10,000?

I should say that there is obvious discrimination between the rich and the poor. For example, if an individual is claiming rights under the Federal Social Security Act, isn't he entitled to a Federal forum regardless of the size of his claim?

What would the average citizen conclude about the fairness of our judicial system if, as Prof. Charles Alan Wright put it, they are denied access to the Federal courthouse because they "cannot produce the $10,000 ticket of admission"?

Judge O'Connor. Senator, of course that is a concern, but I think it needs to be viewed in the context of having a strong and capable State court system that can hear and resolve many of these same problems. That was simply the thrust of my comments.

Obviously it is a matter for this Congress to debate and consider. There are opposing policy considerations in place. However, to the extent that you truly feel that a litigant can and does obtain a fair and full resolution of a problem within the State court system, then perhaps to that extent you would feel that we have provided an appropriate remedy and resolution.

It simply is a matter of whether you want in all aspects both systems to be handling every problem or whether you want the Federal courts to exercise more limited jurisdiction, if you will.

ALLOWANCE OF ATTORNEYS' FEES

Senator **METZENBAUM**. Judge, you suggested congressional action to limit the use of section 1983, which could be accomplished by directly or indirectly limiting or disallowing recovery of attorneys' fees. Would you expand upon that?

It seems to me that if either the court inherently has that right to grant attorneys' fees or if the Congress has given it that right, and if the litigant has no other way of providing himself or herself with access to the courts, that is a very discriminatory kind of approach to the law. It concerns me very much. It concerns me that that would be the position of a member of the Supreme Court.

Judge **O'CONNOR**. Senator, I am not suggesting that the Court itself should draw those distinctions. Indeed, I think it is a subject of appropriate congressional inquiry. We are dealing here with an act of Congress in section 1983 and in section 1988.

Obviously someone who is poor, who has no other right of access to the Court, who cannot afford an attorney, and who has a valid claim should be entitled to pursue that claim and should have some avenue of relief ultimately in recovery of attorneys' fees. That is not inappropriate.

However, to the extent that the act is being used, if you will, in ways in which you and Congress did not originally envision, if that be the situation, and if you feel that the act in fact is being abused in some areas, then obviously it is within the prerogative of Congress to affect the extent of the use of it by altering or changing the extent to which recovery is going to be allowed for attorneys' fees.

Certainly the expansion of the use of section 1983 has been very great. Perhaps it is being used today in a manner which originally was not envisioned by those who drafted it. I do not know that and I would want to do more extensive research, but that is entirely possible.

Senator **METZENBAUM**. Certainly it is used more extensively than it was when originally drafted. It is an act of 1871. It is the basic civil rights act. It is the Ku Klux Klan Act of 1871.

Certainly in changing times it is being used more extensively. However, the fact is that the attorneys' fees that are being allowed do not reflect any abuse because they were actually allowed by a court. The Court would not have allowed them presumably if there were no merit to the allowance of those fees.

Yet you suggest in the William and Mary article that there be a legislative proscription with respect to the allowance of attorneys' fees in civil rights cases.

I have difficulty following that line of thinking. Even though it is used far more extensively and would of course be more extensive than in 1871, if you disallow that you do two things: You deny the litigant in a civil rights case the right to recover legal fees when he or she has no other place to turn to, and you also deny by your suggestion of the $10,000 limit the litigant access to the Court.

I find that the convergence of these two creates a situation that I think would, at least on its face, appear to be discriminatory against civil rights litigants as well as the poor and those who have difficulty in providing for themselves with attorneys.

Judge O'CONNOR. Indeed, Senator, if the Congress felt that the civil rights litigation were the appropriate role and function for section 1983 cases it could restrict the application accordingly.

I think you are aware that, in fact, what has happened is that the Court has extended it far beyond civil rights cases and has applied it to virtually any violation of any Federal law. This is a far cry, I assume, from what was intended perhaps at the time that it was drafted. At least that is arguable.

Certainly what was being suggested in the article is that Congress take a look at this and, in fact, determine if that is the intent of the Congress and if it is being used in the manner that Congress feels is appropriate and proper.

To the extent that it is, then allowance of attorney's fees seems eminently appropriate. To the extent that it is not, of course Congress in its wisdom might see fit to make changes.

Senator METZENBAUM. As a matter of fact, the article indicates a conclusive point of view; and that is that such a move would be welcomed by State courts as well as State legislatures and executive officers and then goes on to refer to the fact that the Congress indeed has moved in the opposite direction to open the courts to more access.

I am frank to say that that attitude is a matter of concern to me—denial of access to the courts and denial of an opportunity to be represented by counsel who in turn would be paid, provided that the litigant was awarded fees by the court. It provides some concern for this Senator.

Judge O'CONNOR. Again, Senator, I would like to point out that that article in no way suggested that anyone should be deprived of a judicial forum for airing his or her grievance.

I think the thrust of the article was that we have two parallel court systems and it is really a question of choice: Should the litigants be encouraged to direct their inquiries and their remedies be sought initially through the State court system, or do we want to channel everything to the Federal courts?

Speaking as a State court judge, it was my view that perhaps we could safely encourage wider use of the State court system—that it was not necessary at every level and in every instance to have the choice, if you will.

That was simply a point of view being suggested from the perspective of one who has been involved in a State court system. That of course is a matter for Congress in its wisdom to debate.

Senator METZENBAUM. They have the choice, and they would lose the choice under your article. I hope they do not.

Judge O'CONNOR. But not their remedy or a forum.

Senator METZENBAUM. Not their remedy, but no choice of forum. I think my time has expired, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Dole?

DIVERSITY JURISDICTION

Senator DOLE. Thank you, Mr. Chairman.

I have one or two followup questions, one based on the same article on diversity that was alluded to by the distinguished Senator from Ohio, Senator Metzenbaum, in which you did indicate, as I understand it, that you favor the elimination of restriction of diversity jurisdiction as a ground for bringing a suit in Federal court.

My only question in that regard would be: What would you recommend to States to accommodate their increased caseloads if that in fact were done?

Judge O'Connor. Senator Dole, I do not think that my suggestion was conclusive in that regard. I simply offered that again as something which I think is appropriate for Congress to consider as it considers how to deal with the increasing caseload of the Federal district courts.

Obviously, to the extent that the diversity jurisdiction is reduced or eliminated, it will impact upon the State courts.

We do have some jurisdictions—and I think perhaps Los Angeles County is one—where there is a shorter time to get to trial in the Federal courts than there is in the State courts. Lawyers and litigants in that community would be particularly unhappy with that kind of a change.

So these raise very serious questions obviously, and that is probably why so little action has been taken over so long a time.

There are diverse views on it, and it is a very thorny issue, but I do think it legitimately is one of the things that Congress should be considering as it addresses this whole problem of State and Federal courts.

Senator Dole. I have another question with reference to the same comment:

One of the traditional arguments for retaining diversity as a basis for Federal jurisdiction has been the fact that the State courts might have a bias in the favor of litigants who are also citizens of that State. Do you have any recommendations as to how we might address that problem if we abolish diversity?

Judge O'Connor. Senator, I certainly have not had experience in other States, but in our State it has not been my experience that that is the case—that a litigant need to be concerned about how long he or she has been a resident of that State or in fact whether he is a resident at all. In fact, I believe that justice is being administered very evenhandedly with regard to that, so I am not sure that that continues to be a valid concern in today's world.

APPLICATION OF EXCLUSIONARY RULE

Senator Dole. Senator Laxalt and maybe others earlier today discussed the exclusionary rule. I want to follow up.

What is your opinion of whether or not the exclusionary rule should be applied to cases where law enforcement officers have committed technical violations of law which do not affect an individual's constitutional rights?

Judge O'Connor. These are among the examples that I referred to when I said a number of courts around the country within the federal system are beginning to approach the exclusionary rule in a different way and to eliminate, if you will, from the application of the rule the so-called technical violation.

We have not seen a full resolution of that approach yet by the U.S. Supreme Court, but there is every indication that perhaps some of those issues will again be addressed by that Court.

Senator DOLE. It would seem to me that, as you have indicated, based on maybe an invalid warrant or a misunderstanding of the facts, if it does not violate one's constitutional rights then I think we need to take a look at that aspect of it.

We used to talk about strict constructionists around here—it has been some time. I do not quite remember when that was, come to think of it, but what does that term mean to you? It was one that was widely discussed. I think it is well understood by those on the judiciary. Do you have any definition of that term?

Judge O'CONNOR. Well, I suppose, Senator Dole, to me it might mean someone who appreciates the difference between the policymaking functions of the legislative body and the judicial role of interpreting and applying the law as made by the legislative body; in other words, the difference between making the law and interpreting it.

Senator DOLE. You come down on the side of the interpreters, as I recall your statement and other statements that have been made?

Judge O'CONNOR. I have expressed the position that I know well the difference between the role of the legislator and the judge, and I understand the proper role of the judge as being one of interpreting the law and not making it, if you will, in very simplistic terms.

Senator DOLE. I agree with that. We supposedly make the law. We wonder sometimes if we do it effectively, but we have seen the Court also make law, and I think that has been the concern of many. I know it has been a concern of many on this committee when they talked about judicial restraint or judicial activism. Your view of that term would be in accord with the one I believe is the correct one.

Senator Mathias in his first round of questions asked about your views on the power of the Federal judiciary. Of course, we do limit judicial independence in many ways in Congress, whether it is through the appropriation process, the appointment of judges, oversight on appointments, or impeachment.

As Congress employs these powers granted to it under the Constitution, it frequently has an impact upon Court decisions.

My question would be: To what extent, in your view, should the Court as it sits be cognizant of public and congressional sentiment on issues before the Court?

Judge O'CONNOR. Senator, it seems to me that properly the Court would have to be considering really only the facts of the particular case and the law applicable to those facts.

It would seem to me rather a dangerous process in general, if you will, to go outside the record and outside the law for guidance in determining how a given matter should be handled or addressed.

I suppose that is why we strive to have judicial independence—so that cases are not based on current perception of outside activity but rather on the matters that appropriately come to the attention of the courts.

Senator DOLE. Rather than what may be the issue of the day before the Congress, whether it is busing or whether it might be some other issue. I think busing has been discussed. That is only one of the issues where Congress, I think, sometimes felt that the Court had a hearing problem. We sometimes believe in this branch that the Court—maybe properly so—is oblivious to what happens in the outside world.

Judge O'CONNOR. Senator, I am sure that through the arguments of counsel and through the brief-writing process and the citation of appropriate authority the Court is never totally oblivious to what is going on. I have to assume that the litigants themselves are making known to the Court through the briefs and the arguments the realities of life.

It is just that I do not think the Justices on their own—or judges anywhere for that matter—should be in the process of going outside that judicial process for guidance in reaching decisions.

Senator DOLE. Senator Thurmond in his questions asked you three specific questions with reference to votes on abortion while a member of the Senate in the State of Arizona. You also mentioned your sponsorship of Senate bill 1165.

Is it fair to ask whether or not that particular legislation accurately represents your view on abortion? As I recall, in summarizing what Senate bill 1165 entailed, it was that no payment benefits be made unless the mother's life was threatened.

Judge O'CONNOR. In Senate bill 1165 I was not the drafter of the bill; it was the State medicaid bill.

The leadership had assigned the subject of Arizona's role in the field of medical care to the poor to a citizens' committee.

As I recall, Dr. Merlin Duvall headed up that committee at the time. He later became the dean of Arizona's medical school.

The committee, in any event, recommended the adoption of this particular bill; and it included that provision in it concerning the use of public funds; and I supported the bill and its provisions.

Senator DOLE. And that bill did become law?

Judge O'CONNOR. Yes, it did. It was never funded thereafter for the medicaid function. It is still on the books today.

Senator DOLE. But is it fair to conclude that that might reflect your views on that issue?

Judge O'CONNOR. Yes, Senator, it reflected my views on that subject when I voted for that measure.

Senator DOLE. What about today?

Judge O'CONNOR. Yes—in general substance, yes.

Senator DOLE. Senator Metzenbaum also discussed the question of disallowing attorney's fees in certain areas brought under 42 U.S.C. 1983. I think you have addressed that question.

If the legislative reforms which were mentioned in the William & Mary article in civil rights suits are heard in State as opposed to Federal courts, would there be any danger of plaintiffs being victims of bias or prejudice—if they are limited to State courts rather than Federal courts? Is that a problem as you see it?

Judge O'CONNOR. It is a potential problem; and to the extent that it is there has to be a means for eventually removing the issue, if that occurs, to an appropriate forum where it would not be a problem.

Senator DOLE. Thank you, Mr. Chairman.

Thank you, Judge.

The CHAIRMAN. Thank you.

Senator DeConcini?

EXCLUSIONARY RULE

Senator DeConcini. Thank you, Mr. Chairman.

Judge O'Connor, we have had some discussion today on the exclusionary rule—something that is being focused on by this committee. I wonder if you could comment on a decision that has already been handed down by the Supreme Court in 1971—the *Bivins* decision?

I do not expect you to give us any insight—because I do not think you could fairly do that—on how you would vote on it, and I am not asking that question, but I want to quote from that decision.

Chief Justice Burger declared:

> I see no insurmountable obstacle to the elimination of the suppression doctrine—the exclusionary rule—if Congress would provide some meaningful and effective remedy against unlawful conduct by governmental officials.

My question is, Do you generally agree that it is an area that Congress properly, or any legislative body, could delve into and make changes as far as the suppression doctrine is concerned?

Judge O'Connor. Senator DeConcini, if I understand what you were reading correctly from Justice Burger, it was the suggestion that indeed Congress could appropriately provide a remedy to a citizen from whom evidence had been illegally taken by way of a civil damage action, for example, against that individual.

As I recall, the *Bivins* versus six unknown agents case actually held that indeed there is a cause of action against the peace officer who unlawfully violates someone's fourth amendment rights.

So I understand that that cause of action exists today by virtue of that decision, and I think the Justice was perhaps talking about Congress implementing some kind of remedy. I do not know that he was talking about an enactment to eliminate the doctrine, and I would hesitate to express a view on that.

Senator DeConcini. Do you think it is a proper area, Judge O'Connor, for Congress to delve into and consider; and maybe if they come to the conclusion, do you have any problem with Congress altering the present Supreme Court decision on the exclusionary rule? That is really my question.

Judge O'Connor. I do not know, Senator DeConcini, whether it would be valid for Congress to simply by congressional enactment eliminate this judge-made rule—I cannot say—but I can, I think, safely say that I understand it is not a constitutional doctrine which has been invoked; it has really been a judge-made rule.

Certainly the study of Congress about the problem, and the consideration of it, and the factfinding process that goes on are of great benefit, I would say, to all of us including the courts as the courts reexamine the problem.

It cannot hurt, and it could certainly help to have a great deal of examination of the problems that have ensued and from factfinding.

Senator DeConcini. Judge O'Connor, my research indicates that probably the paramount reason for the exclusionary rule to exist and to be handed down by the Supreme Court was for the purpose of deterrence.

It is also interesting to note that six out of seven extensive studies that have been conducted in the last several years have all come to an easy conclusion, I might say, that it has not deterred the police or other law enforcement officials of abusive or illegal searches and seizures, which draws me to the conclusion that perhaps it is a proper time for Congress to consider some other remedy and provide some statutory area where the exclusionary rule might at least be modified.

Be that as it may, I believe we will address that problem here.

Your article that is constantly referred to in the William & Mary Law Review is one of the finest works that I have had the pleasure of reading.

I gather from it—obviously—that you feel the State courts ought to play a greater role in the whole judicial area, perhaps providing a little less pressure on the Federal judiciary.

Let me ask you this: What do you think is the proper role for the Federal Government as far as encouraging the State court system to conduct and accept a greater role? In addition to limiting some of the jurisdictional areas that you touch on in your article, do you feel that financial assistance, or educational programs, or training for judges or prosecutors or law enforcement officials; or do you have any thoughts on that subject?

JUDICIAL TRAINING PROGRAMS

Judge O'CONNOR. I do, Senator. In addition to the adjustments, as you mentioned, of any jurisdictional aspects that would encourage the State court systems to operate, it seems to me that judicial training programs are really of enormous benefit to State court judges, as I am sure they are to Federal judges. I am a believer and a supporter of those programs.

Naturally, they cost money; and for the judges to attend them some help is needed, whether it be at the State level or with other assistance.

Likewise, training programs are vitally important in the criminal justice system for the prosecutors and defense counsel.

Our legal system works at the trial level and the appellate level only to the extent that we have capable lawyers representing both sides of the questions. It does not work or function very well if one side is poorly represented in the case before the court.

Certainly, to the extent that we want the criminal justice system to operate well, I think it is vitally important that we have skilled prosecutors as well as skilled defense counsel, and that takes training.

These are young people for the most part, and you have to give them training as a substitute, if you will, for years of experience.

Senator DECONCINI. Judge O'Connor, can I take it that you do not have any philosophical problem with the Federal Government participating in some educational program, obviously subject to the ability of the Government to pay its bills—which has not been very outstanding in the past number of years—but it does not trouble you if there is assistance, from the standpoint of education and training, offered by Federal programs—if there happen to be some good ones left?

Judge O'CONNOR. No, I cannot say that it does.

PERSONAL PHILOSOPHY OF ABORTION

Senator DECONCINI. Returning to the subject—and I am sure it probably will never end—of abortion, you have expressed your views a number of times here today and just now with Senator Dole. I wonder if you could share with us for just a few minutes not the voting record—I know you have had no judicial decisions on the subject matter that we could find—but your personal philosophy or feeling as to abortion so the record would be clear today?

Judge O'CONNOR. OK, Senator. Again let me preface a comment by saying that my personal views and beliefs in this area and in other areas have no place in the resolution of any legal issues that will come before the Court. I think these are matters that of necessity a judge must attempt to set aside in resolving the cases that come before the Court.

I have indicated to you the position that I have held for a long time—my own abhorrence of abortion as a remedy. It is a practice in which I would not have engaged, and I am not trying to criticize others in that process. There are many who have very different feelings on this issue. I recognize that, and I am sensitive to it. But my view is the product, I suppose, merely of my own upbringing and my religious training, my background, my sense of family values, and my sense of how I should lead my own life.

Senator DECONCINI. Judge O'Connor, along that line I have one last comment about it. This is not something that has come upon you in the last year or two or the last 6 or 7 weeks; this is a commitment and a feeling that you have had for a long period of time, I assume from the answer to the question.

Judge O'CONNOR. I have had my own personal views on the subject for many years. It is just an outgrowth of what I am, if you will.

Senator DECONCINI. Thank you. I appreciate that response in depth regarding your own personal background.

I regret to some extent that it is necessary to delve into that, but I believe—as you can appreciate here—it is a sensitive subject among many Members on the many sides of this issue. I think it is very important that it be laid out clearly and precisely, and I think you have done just that.

JUDICIAL DISCIPLINE

To turn to another subject, one of great concern to me, Judge—many references today have been stated about the uniqueness of the status of a Federal judge, including a Supreme Court Justice, mainly that you will serve on the Court for your life.

The Constitution provides a mechanism by which the Legislative branch of Government may remove Federal judges, and I refer of course to the impeachment process.

As a practical matter, impeachment has been used only infrequently because of its cumbersome nature; plus, there has been virtually total lack of supervision over Federal judges and the Federal bench.

A number of highly respected constitutional scholars has argued that the impeachment mechanism is a corollary to the separation of powers in the sense that the extraordinary procedure must be established when one branch of Government seeks to remove members of another branch of Government.

However, this formulation leaves open the issue of whether or not it is constitutionally tolerable to allow for some sort of mechanism wholly within the judicial branch itself that would enable Federal judges to discipline and maybe even remove errant or mentally disabled colleagues.

It is manifestly unfair to the citizens of this country, it seems to this Senator, to allow incompetent or alcoholic judges to continue to hear cases.

Do you believe, Judge O'Connor, that there would be a proper procedure or mechanism that could be set up constitutionally?

I might add that some of your soon-to-be colleagues on the Bench have expressed positive views in this regard and one or two of them some negative views.

I am interested in your overall position regarding judicial discipline and whether or not a mechanism, in your judgment, might be created within the Judiciary.

Judge O'CONNOR. Let me speak from my experience at the State level. Of course, as a State court judge I have been subject to periodic review by the electorate; and that is a process that has certainly not distressed me at all. I think it has been satisfactory and indeed helpful to know how you are viewed by the citizens for your performance.

In our State we also have a system that incorporates a commission which is charged under our State constitution with review of the capacity of any judge who is alleged to be incapacitated from service and who should be removed or disciplined in some fashion.

I think that that commission has worked well within our State, and I think it is appropriate and useful.

Whether it would work equally well at the Federal level I am not in a position to say because of course I have not been involved at that level.

Whether it raises constitutional problems is a matter that would have to be reviewed from the standpoint of reviewing a particular proposal, listening to the arguments, and so forth.

But speaking just in terms of my own personal experience, that kind of a system has worked satisfactorily in Arizona.

Senator DECONCINI. Most States have adopted such a system in some manner or another, and Arizona—I cannot remember when it was adopted. You may have been in the legislature when that occurred.

Judge O'CONNOR. I was—yes.

Senator DECONCINI. And you were probably a supporter of that legislation?

Judge O'CONNOR. I was—yes—and I have watched its operation and have felt that it was sound.

Senator DeConcini. The question that comes, of course, is the one you touch on: The constitutionality—something extremely sensitive.

We have had testimony here on the Judicial Tenure Act which has passed both Houses and been enacted, not nearly as restrictive as I would have liked to have seen it, being one of the cosponsors, but certainly a beginning, endorsed by the Chief Justice of the Supreme Court and providing for some procedure to handle complaints within the various circuits and then some procedure to take those complaints further up if there was some merit.

That particular legislation excluded the Supreme Court from its consideration.

History shows us that impeachment procedures are really impractical today, and the struggle that a legislator has—and you might have had the same struggle when you were in the State senate—is how do you attempt to provide the citizens with some way to have a grievance heard when there is indeed a judge.

There have been a number of instances written about, a number of instances provided before our committee when we had this bill—the Judicial Tenure Act—before us last Congress, where indeed there was no question but that the judge was misbehaving under the good behavior clause and there really was no way except through peer pressure.

I take it from your answer that you are committed on the State and your experience is that it is very positive and that barring constitutional prohibitions you are not adverse, at least philosophically, to an approach on the Federal level.

Judge O'Connor. That is correct, Senator. My experience at the State level with it has been a positive one.

The concern that I hear people generally express is that as our society has grown so large and as people feel that they are faced with some kind of faceless bureaucracy in the Executive branch and with a tenured Judiciary, if you will, which is not subject to review on the other hand, it can be a sense of frustration for the common citizen. I can well appreciate the concerns that have caused consideration to be given to the problem.

How it will work in practice and whether there are any constitutional problems with what Congress has proposed I am refraining from suggesting.

Senator DeConcini. I thank you, Judge O'Connor.

Mr. Chairman, might I suggest a short break sometime this afternoon at the appropriate time?

The Chairman. We plan to stop at 5, but if Judge O'Connor would like to have a break before then we would be pleased to allow it.

Judge O'Connor. Mr. Chairman, it is fine with me for you to continue—as you wish.

The Chairman. You prefer to continue?

Judge O'Connor. That is fine with me, Mr. Chairman—at your pleasure.

The Chairman. The judge says she does not need a break. [Laughter.]

Senator DeConcini. Mr. Chairman, I just want to be sure you are taking care of her.

The CHAIRMAN. Senator Simpson had his round before lunch, so we now come to Senator Leahy.

JUDGE-MADE LAW

Senator LEAHY. Thank you, Mr. Chairman.

I commend my colleague from Arizona for making sure that all Arizonans are taken care of in the chamber.

Judge O'Connor, I apologize for being a couple of minutes late this afternoon. I came in as you were responding to a question from Senator Laxalt. It was concerning the exclusionary rule. We have had a great deal of discussion already this afternoon on that.

You distinguished a judge-made rule from one of constitutional dimension. If you have a judge-made rule on a constitutional issue, is that not of constitutional dimension? I do not understand the distinction.

Judge O'CONNOR. Of course there are constitutional implications. Under the fourth amendment we cannot of course violate the search and seizure provisions of that amendment, and that amendment is applicable to the States under the 14th amendment.

What I was referring to by the judge-made portion of the rule is simply the effect, if you will, of the utilization in court of evidence which has been obtained in that fashion—illegally obtained, if you will—as opposed to, for instance, the securing of a confession by force, which raises I think very different problems.

Senator LEAHY. In effect, using the exclusionary rule to bar a confession—are we now at a constitutional level or are we at a judge-made level? I still do not understand the distinction, Judge.

Judge O'CONNOR. Senator, we of course are dealing with the Constitution when we talk about search and seizure questions; but the rule which the Court applied on the utilization of the evidence is one which the courts really developed themselves and developed initially to apply in the Federal courts and then subsequently carried over for application to the State courts.

It is that to which we commonly refer, I think, when we talk about the exclusionary rule.

Senator LEAHY. What about the exclusion of an unconstitutionally obtained confession or any of the evidence that might be obtained from that? Is that also within that parameter, would you say?

Judge O'CONNOR. Perhaps, Senator. In discussing the question earlier—and perhaps you were not here—I indicated that the concern that has been expressed by some for reexamination of the exclusionary rule has not been heard, at least by me, to encompass such matters as the confession obtained by force, trickery, or something of that sort.

The Federal courts that have been discussing and indeed holding that the exclusionary rule does not apply in certain instances have been addressing themselves to the so-called good faith exception, if you will—either the technical error made by the police officer, or the error made by him when he assumes he has a valid warrant and does not, or when he assumes he is operating under a particular case holding which in fact has been overturned, and another type of good faith exception which relates to the officer's understanding of the particular facts involved.

These are areas in which I have noted that Federal courts have begun to talk about changes or exceptions to the exclusionary rule.

Senator LEAHY. You see such changes as being judge-made law?

Judge O'CONNOR. Yes.

Senator LEAHY. The potential for such changes being judge-made law?

Judge O'CONNOR. I think that I could probably characterize them as such.

Senator LEAHY. Senator Biden asked you a question about *Brown* v. *The Board of Education*. It was on the subject of judicial activism, a term that I guess means many things to many people.

You said that it did not create new social policy by the Court but was simply the Court reversing a previous holding based on new research, but that new research was not any new research into the Constitution or into the law, was it? Was not that new research rather the effects of segregation on minorities? It certainly was not into congressional debates over the 14th amendment.

Judge O'CONNOR. Senator, I think there was an element indeed of the examination of the intent of the drafters of the amendment. I am sure that particular case was impacted also by perceptions of the social impacts in that particular instance.

Senator LEAHY. But there is no new knowledge of the law in that regard?

Judge O'CONNOR. What I was trying to say was that in some cases in which our Court has reached a contrary result after a period of years to a previous decision they do so occasionally based on a reexamination of the legislative history and of the intent of the framers in an effort to determine whether the prior determination was correct.

I am sure we do not have much new evidence to be examined, but perhaps people are examining in some instances more thoroughly the evidence that we do have.

Senator LEAHY. But did we not end up with a new social policy with very far-reaching implications?

Judge O'CONNOR. I think in that instance we did—yes.

Senator LEAHY. And could that not be considered either judicial or social activism?

Judge O'CONNOR. I think it was so considered and still is so considered by many.

Senator LEAHY. How do you consider it?

Judge O'CONNOR. Senator, I consider it as an accepted holding of the Court. I was not there in 1954; and I did not participate in the debate, and the hearings, the briefings, and the arguments; and I cannot tell you all that went into the making of that decision.

Certainly it overturned a precedent of long standing, and it did so on the basis of a decision by a very substantial majority—8-1, as I recall—that the previous understanding of the 14th amendment was a flawed understanding.

REFLECTION OF POPULAR SENTIMENT

Senator Leahy. Do you feel that that decision can stand as a correct interpretation of the Constitution and not simply a reflection of popular sentiment of the time?

Judge O'Connor. Well, it has stood since 1954 and apparently is well entrenched.

Senator Leahy. The reason I ask that is that the Republican platform on which the President ran last year talks about appointment of judges who reflect popular sentiment and respect for the sanctity of human life and tends to be the main criterion for picking judges.

Do you feel that is a somewhat narrow criterion on which to pick judges? Would you use a different one?

Judge O'Connor. Senator, I think we need to use every possible evaluation of a potential judge in an effort to place very well qualified people on the bench. It seems to me that we want to consider all aspects of the individual's character and ability.

Senator Leahy. Would you put as a primary consideration a judge who would reflect popular sentiment?

Judge O'Connor. Senator, I would like to think that the individual characteristics of the person, the capability, the judicial temperament, and the judicial capacity would be critically important.

Senator Leahy. Do you feel that a judge should feel perfectly able and willing to fly totally in the face of popular sentiment if the judge felt that that was the only way to reflect the law?

Judge O'Connor. If that is necessary. I think judges must be prepared to act with courage.

Senator Leahy. Do you feel that a judge should feel perfectly prepared to fly in the face of popular sentiment if the judge was convinced that in so doing the judge was upholding the law?

Judge O'Connor. Senator, I think we have to approach each case on the basis of the facts of the case and the law applicable to it; and we consider the case as judges in the context of the case which has come before us—the factual record—the briefs that have been filed, and the arguments of counsel.

I do not think that judges are permitted to go outside the record in resolving the issues to come before the judge.

Senator Leahy. Albeit a judge does not live isolated in some type of a never never land. Judges do read newspapers, do see the news, do live as members of the community and should——

Judge O'Connor. I hope so.

Senator Leahy [continuing]. In each one of those instances, or else we have a lifeless judiciary.

A judge can well be aware of what might be popular sentiment of the time. If a judge feels, however, that the popular sentiment does not reflect the law and must rule on an issue where the law is, in that judge's estimation, contrary to popular sentiment. is there any question where the judge has to go?

Judge O'Connor. Not in my mind. I think the judge is obligated to apply the law as the judge understands it to be.

Senator Leahy. Thank you.

What do you feel are the most important criteria in picking a judge? I ask you that question because I would assume that that would be also reflective of your own concept of judicial temperament.

Judge O'CONNOR. I think we have to examine the person's overall character, integrity, capacity, experience, training, and performance.

Senator LEAHY. The William & Mary article—incidentally, the William & Mary Law Review has never gotten so much publicity in 1 day's time. Right now there are dozens and dozens of law schools who wish that their law review editors had had the foresight to ask you to write for them. [Laughter.]

You suggest in that article that in the next decade there will probably be significant traditional State court variations in cases involving the issue of illegal searches and seizures under the fourth amendment.

You also say that, assuming the State courts are providing a full and fair opportunity for the claims to be raised and the Federal habeas corpus review is unavailable, the State courts are more likely than their Federal counterparts to reach widely varying results on search and seizure issues.

Does that present some danger to the notion of a single constitution? Cannot States create a kind of balkanization of constitutional rights, almost?

Judge O'CONNOR. That is an ultimate danger if there is no final review mechanism. That is correct.

Senator LEAHY. How do you feel, on the question of final review—obviously the U.S. Supreme Court is not in a position to review every single case from every single State court—of the great number of cases that might present a constitutional issue?—obviously, a matter of concern to a lot of people.

There have been discussions of an intermediate appellate court—a super court of appeals—beyond the normal courts of appeals. How do you feel about that?

Judge O'CONNOR. I know there is discussion of that. In fact, unless I am mistaken, Senator Heflin on this committee has taken a major role in discussions of that, among others.

Justice James Duke Cameron, a former chief justice of the Arizona Supreme Court, has just released an article on the same subject, as a matter of fact.

There is wide discussion of the possibility of establishing a national court of appeals to sit somewhere between the Supreme Court and the various Federal courts of appeal.

I think there are many variations of that court being discussed—many possibilities. There are both pros and cons to having that development occur, and I am sure that you have undoubtedly participated in some of the hearings and are in the process of being informed about those proposals.

I do not have a fixed view on whether that would be desirable, or if it were the form which it should take.

I know that some discussions have suggested they should just deal with criminal law. Others have taken a broader view. Some have suggested that the referrals should all be made to the court from the Supreme Court. Others make different suggestions.

There is such variety in the proposals that I have heard that it is really hard to know which ones are being seriously considered, but

I think it is appropriate for the Congress to air these possibilities and to hear from as many people as it can on the subject to determine whether there is any consensus that that would be a step in the right direction.

Senator LEAHY. Thank you, Judge. I appreciate your openness and candor before the committee today.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator East?

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I greatly admire your fortitude here. This is an exquisite form of torture, I think. The Senators, you will note, come and go at their leisure; and we expect the witness to sit here and endure this. I was greatly impressed with your willingness to continue even when our distinguished chairman gave you the opportunity of opting out for a while.

I appreciate the great frustration that you feel in this; and I think Senators do, too—that we are never able to explore things in the depth that we would like to and to the extent that we would like to.

I guess it inheres to things human that you have time limitations, and so we all have 15 minutes and come back for another 15.

I would then like to have it understood that I am trying to get to the heart of what I think are some critical matters, not that these matters that I wish to raise are necessarily the sole litmus test for qualification, but because of the time limitations under which we all work we must single out a few things to make a point or two on and see, when we put it all together, if we have probed to some depth and substance. I would at least like in my own small way to try to contribute to that end.

SEPARATION OF POWERS

You have stated your general judicial philosophy as regards separation of power, which I think was well stated. You have certainly given us some indication of your conception of federalism, which I again think was well stated.

It does seem to me that it is appropriate to pursue certain substantive areas that would reflect upon your basic values on certain subjects because—to be candid—even though we talk about a rigid separation of policymaking and judicial interpretation of the law, we all know in the real world of the Supreme Court that, for good or for ill, the decisions of the Supreme Court have enormous policy implications. That has been true since *Marbury* v. *Madison,* and one could think of many classic cases illustrating the point you have discussed—*Brown* v. *The Board, Plessey* v. *Ferguson, Dred Scott,* ad infinitum—the enormous policy impact the Supreme Court has.

Hence, the basic fundamental values on certain crucial items that respective Justices have to me do become critical factors to consider because we are not working in a vacuum today; you will not work in a vacuum once you are appointed to the U.S. Supreme Court, assuming that things continue to move in that direction.

Let me cut through this gordian knot and get to the heart of one issue which has been alluded to before—there is no question about it; namely, this very difficult, hotly debated issue of abortion in the United States.

I wish to say again that I do not think it is the sole test for qualification. I do not think it is the only thing that ought to be pursued, nor has it been the only thing that has been pursued, but certainly it is fair game as a part of a whole panoply of items—concept cases—that we might pursue.

As I understand, Mrs. O'Connor, your basic personal position on this issue of abortion—just stating your personal values—is that abortion on demand as a form of birth control—you are personally opposed to that? Is that correct?

Judge O'CONNOR. Yes, Senator.

Senator EAST. Let me then follow up with this question: It has sometimes been said that most people personally oppose abortion as a form of birth control—that the real division is between those in the public arena who might wish to do something about it and those who would choose to do nothing about it.

As regards that particular division, what do you think would be an appropriate public policy position as far as dealing with the subject of abortion on demand as a form of birth control is concerned?

Judge O'CONNOR. Senator, I really do not know that I should be in the business of advising either this Congress or State legislators with regard to what their present posture should be in developing public policy.

I feel that it is a valid subject for legislative action and consideration, and certainly this Congress and your subcommittee have been deeply involved and engrossed in dealing with this precise area and determining to what extent this Congress should take certain action.

I appreciate that and appreciate that effort. It certainly is an appropriate role for the Congress. I just do not think that it is a proper function for me to be suggesting to you what you ought to be doing.

Senator EAST. Fine. I appreciate your concise and candid answer.

Let me pursue then this point: I gather what you are saying is that you do feel that it is fundamentally a legislative function to deal with the public policy question of how one copes with abortion on demand as a form of birth control. You would look upon that in a separation of power context, at the Federal level at least, as being in the domain of congressional action as opposed to the other two branches of the Government? Would that be correct?

Judge O'CONNOR. Senator, I would, subject only to any constitutional restraints which might exist. That is not to say that it should not also be the subject of State legislative consideration.

Senator EAST. I think, just parenthetically, on your latter point it is valid—that initially this was fundamentally a State function—to deal with the question of abortion. It was certainly so envisioned by the framers and certainly so envisioned by any reasonable interpretation of the Constitution. I appreciate your candor on that, Mrs. O'Connor.

Let me proceed with this question if I might: I would like to get your reaction to this particular statement by Justice White as a dissenter in *Roe* v. *Wade* in which Justice Rehnquist joined him. This is what they had to say about the majority opinion in that case *Roe* v. *Wade*—of 1973, which candidly is considered by many, even those who have differing views on the abortion issue, as probably the most glaring and flagrant example we have of judicial usurpation of congressional or—as you rightly put it—State policymaking function.

I would appreciate your reaction to this statement. Again, I am quoting directly from Justices White and Rehnquist. They say: "As an exercise of raw judicial power the Court perhaps has authority to do what it does today, but in my view"—Justice White, Rehnquist agreeing—"its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court."

Does that sound to you like a good statement of your judicial philosophy and a pertinent one as regards—yes, candidly—the specific issue of dealing with abortion on demand in the public arena?

Judge O'CONNOR. Senator East, I have read, of course, the dissent in *Roe* v. *Wade,* and I have read at least several scholarly articles criticizing that decision and have attempted to do a good deal of reading on the subject.

I am well aware of the criticisms that are leveled in those dissenting opinions of Justices Rehnquist and White, as I am of the other criticisms that have been raised.

For me to join in that criticism would be perhaps perceived as an improper exercise of my function right now, as a nominee to the Court, for the simple reason that I suspect we have not seen the last of that doctrine, or holding, or case, and that indeed we are very likely to have the matter come back before the Court in one form or another.

At least many who are dissatisfied with the opinion have expressed that one of the things that should be done is that the Court should be asked to reconsider that very holding, in which case consideration of the views expressed in the dissent as well as the majority and the other criticisms that have been raised and the comments pro and con would be very important and would become a part and parcel of the arguments to be considered when that case is reconsidered.

Senator EAST. I can certainly appreciate your desire not to speculate on hypothetical cases in the future, let alone certainly any existing pending case; but in terms of getting a feel for your fundamental judicial philosophy beyond generality, certainly to comment upon already decided cases and doctrines emanating out of them would be very appropriate in the confirmation hearing process.

This is not of course to be interpreted—and I would so publicly state—that you are promising to vote a certain way on a given speculated set of facts or a hypothetical case in the future.

I am asking really simply whether you think that specific statement is a reasonably valid one in terms of your understanding of this very significant and very profound case that not only deals with a very important issue but deals with the very fundamental question that we are after this whole hearing—namely, the judicial philosophy of you as the nominee.

Judge O'CONNOR. I appreciate that. My concern is simply that which was felt, I suppose, by Justice Harlan when he was asked about the steel seizure cases which had been recently handed down and other nominees who have been asked about their views on the merits or lack thereof of recent decisions before their nomination and their similar reluctance to directly respond.

I understand your concern, and I appreciate it; I think it is appropriate. It is just that I feel that it is improper for me to endorse or criticize that decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts.

I do not think we have seen the end of that issue or that holding, and that is the concern I have about expressing an endorsement or criticism of the holding.

With respect to my judicial philosophy, I certainly feel comfortable in discussing that with you and in indicating how I would be inclined to approach a problem or a case.

I have tried to indicate today that I have attempted to view the role of the judge as appropriately one of judicial restraint in deciding those cases that come before the court on appropriately narrow grounds and resolving issues based on my understanding of the constitutional doctrines which are being invoked.

Senator EAST. Again, I appreciate your candor and your forthrightness. I suppose the frustration—maybe it is somewhat unique, though not at all for a moment reflecting adversely in terms of your qualification or potential service on the bench—is that frequently with nominees there would be, let us say, an extensive record in terms of their background on major substantive questions whereby we would not have to perhaps probe as deeply in a confirmation hearing because we would have a rather extensive written record.

It seems to me if we get a nominee where that is not necessarily so, because of your great work at the State level, we have somewhat of a heightened responsibility to pursue your attitudes.

For example, I would if time would allow—and it has run out on me—one might inquire as to your general feelings on the rights of women and how that might be reflected in the public policy arena; or the rights of minorities—blacks, for example—and how that might be reflected in the public policy arena; or your attitude on the death penalty and how that might be reflected in the public policy arena.

So it is in that spirit that I inquire about it and do agree that I pressed the point to that extent simply because of the dearth of information on the record. Perhaps in my next 15 minutes I can pursue this issue a bit further.

Thank you, Mr. Chairman. I appreciate that my time has run out.

The CHAIRMAN. Thank you.

Senator Baucus?

LIMIT SUPREME COURT JURISDICTION OVER CONSTITUTIONAL ISSUES

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I would like to touch upon a subject that has been addressed by most Senators this morning and this afternoon—namely, what the proper congressional or Presidential response should be when there is profound disagreement with a Supreme Court interpretation of the Constitution.

The classic traditional response has been for Congress and the States to attempt to amend the Constitution through the amendment process.

Another remedy of course would be for the President to try to appoint nominees who were in accordance with the public's view of the issue.

A third approach would be for Congress to attempt to impeach a nominee. Additionally, Congress might try to override the Supreme Court by statute—albeit *Marbury* v. *Madison* would pose a problem.

A final solution—which has been the subject of discussion in this body in the last couple of years would be for the Congress to try to limit Supreme Court jurisdiction of the particular constitutional issue.

Earlier this morning you discussed with Senator Laxalt and another Senator on this committee the *McCardle* and the *Klein* cases and how the precedents in this area have been ambiguous. Furthermore, those cases were decided many years ago anyway.

My question is: As a matter of public policy—as Sandra Day O'Connor, private citizen—what is your view as to whether Congress should attempt to limit Supreme Court jurisdiction over constitutional issues?

Judge O'CONNOR. Senator, I really would feel constrained about giving you my armchair advice on how you should handle these things that are before you.

Senator BAUCUS. Excuse me. I am not asking for you to advise us on how to handle it. I am asking you as an individual citizen what your personal view is.

Judge O'CONNOR. When I was in the State legislature, Senator Baucus, we had occasion to consider a particular proposal—a memorial to Congress asking in that instance that an amendment be constructed to remove jurisdiction of the Supreme Court over a certain subject matter.

I did not support that memorial for the stated reason that I did not feel, as a State legislator at that time, that I wanted to recommend that the jurisdiction of the Supreme Court be limited by subject matter in that fashion.

That was my own response as a State legislator when I had occasion to consider that question. I was concerned that if it started in one area I did not know where it would end and that we could be left without a court to determine the final state of the law in that or other areas.

Senator BAUCUS. Is that still your present view?

Judge O'CONNOR. Senator Baucus, it would be representative of some of the questions and concerns which I would want to address if I were to consider that question as a legislator or Congressman today.

Senator BAUCUS. What are some of the public policy considerations that come to mind on this issue?

Judge O'CONNOR. That which I have indicated—to wit: I believe it was contemplated by the framers of the Constitution that the judicial branch, and acting through the Supreme Court ultimately, would determine the final meaning, if you will, of the Constitution and of Federal law and would resolve conflicts on the Federal law which arose in the other Federal courts.

To the extent that such power is removed by removing appellate jurisdiction of the Court, then it would have the potential effect at least of leaving unresolved those differences that might arise among the several Federal courts and among the State courts, and it would also have the potential effect in any event of leaving in place any of the decisions which had previously been handed down and which gave rise to the concern in the first place.

Senator BAUCUS. So one potential danger would be that the 50 States could have 50 different interpretations of the first amendment—of free speech or free press. That would be one unfortunate result that might occur—is that correct?

Judge O'CONNOR. I think that is probably exaggerated because I have to assume that even if jurisdiction were presently removed over an area we would still have in place those decisions that had previously been handed down. So it is not as though it would be leaving everyone to write on a new slate, if you will.

Senator BAUCUS. But if Congress removed Supreme Court review, wouldn't Congress really be winking at the State courts and saying, "States, go ahead and rule your own way because there is no other body to override any decision you might make"?

Judge O'CONNOR. These are among the questions that I think have to be asked and addressed when we consider proposals of the kind which you describe.

CONSTITUTIONAL AMENDMENT PROCESS

Senator BAUCUS. Do you think that the constitutional amendment process works?

Judge O'CONNOR. Well, it has worked of course about 26 times, and at least we have that many on the books. Some others have been proposed which were not approved.

Senator BAUCUS. But do you think that the process is too cumbersome or too laborious to address unpopular Supreme Court decisions?

Judge O'CONNOR. Senator, there have been several instances in the history of our Nation where Congress has attacked a particular holding of the Court by means of offering a constitutional amendment, and it has been successful to the extent that amendments have in fact been adopted.

For example, the income tax amendment was really in reaction to a holding of the Supreme Court.

So I guess I have to respond that it can achieve the stated goal.

Senator BAUCUS. That is correct. It is my understanding, too, that in that case Senator Robert Taft argued against any attempt to limit Supreme Court jurisdiction on that issue because he felt it better to address it by constitutional amendment—which was ultimately accomplished by the 16th amendment.

I raise the question because, during the debate on whether or not Congress should limit Supreme Court jurisdiction, those who favor such legislation argue that the constitutional amendment process is too cumbersome and too laborious.

I again ask you whether in your view you think the process is too laborious or too cumbersome or whether it works well. Do you think it is well designed as it is, or does Congress need the additional tool of limiting Supreme Court jurisdiction?

Judge O'CONNOR. The amendment process takes varying amounts of time to accomplish and various amounts of effort to achieve.

Our most recent example is with the 18-year-old voting amendment. It did seem to take particularly long before that process was completed.

We have a number of other amendments in our Nation's history which did not take long to complete. Others have taken much longer and have been much more complex, in terms of dealing with them.

So I think it just depends on a case-by-case basis with the particular subject in mind whether the amendment process is the appropriate one to consider.

There is another means, of course, of resolving issues which the Supreme Court has addressed and which many find to be unsatisfactory; and that process involves asking the Court by means of other cases to reconsider or distinguish the holdings which were found to be unfortunate. This is another way in which, over time at least, changes in unpopular decisions, if you will, have been modified.

Senator BAUCUS. I take it from an earlier answer you gave to another member of this committee that the Court should not be influenced by attempts in Congress to limit its jurisdiction or by what it reads in the newspaper but more influenced by the briefs and oral arguments of the cases before it?

Judge O'CONNOR. It does seem to me that the Court should make its decisions based on legal principles and not on its assessment of outside opinion, if you will.

It seems to me that the Court should review the facts of the particular case and consider the arguments that are raised, which may indeed be reflective of public concern, but should consider those arguments in the proper setting within the framework of the Court itself and within the framework of the oral arguments and the briefing that is done on the cases.

PUBLIC CONFIDENCE OF SUPREME COURT

Senator BAUCUS. Thank you.

I would like to turn to a second subject. According to a Louis Harris poll, in 1966, 51 percent of the American public had a great deal of confidence in the Supreme Court. In 1980, 27 percent of the American public expressed a similar confidence—a drop from 51 percent to 27 percent in 14 years. What, in your view, explains that drop?

Judge O'CONNOR. I am not sure that I can explain it. I suppose that a portion of it would have to be reflective of public perceptions of the results of particular decisions which have been widely publicized and would cause concern.

Perhaps it is a reflection, if you will, of the manner in which the Court has been treated in some form in the media; I do not know.

Perhaps we have more public discussion of the Court, or perhaps we have less. I am not sure which aspects have led to the change in the polls.

SUPREME COURT PRESS CONFERENCES

Senator BAUCUS. Do you think the Court should have press conferences?

Judge O'CONNOR. Do I think they should as a general rule have press conferences?

Senator BAUCUS. Yes.

Judge O'CONNOR. As a personal view only, I probably do not think that that is a good plan.

The Court does attempt to speak by explaining its reasoning and rationale in the published opinions that it issues, and the hope at least is that in that process the reasons will be sufficiently expounded.

EPITAPH

Senator BAUCUS. Finally—I told you I would ask you this question, which is: How do you want to be remembered in history?

Judge O'CONNOR. The tombstone question—what do I want on the tombstone? [Laughter.]

Senator BAUCUS. Hopefully it will be written in places other than on a tombstone.

Judge O'CONNOR. I hope it might say, "Here lies a good judge."

Senator BAUCUS. What does that mean to you? Do you want to be known as the first woman judge or the judge from the West, the judge who upheld civil liberties—just what does that mean to you?

Judge O'CONNOR. If I am confirmed I am sure that I would be remembered, no doubt, as the first woman to have served in that capacity; and I hope that in addition if I am confirmed and allowed to serve that I would be remembered for having given fair and full consideration to the issues that were raised and to resolving things on an even-handed basis and with due respect and regard for the Constitution of this country.

I would hope that on occasion my opinions could reflect clarity of thought and of word and be a reflection of the appropriate values and analysis that I think is merited of these constitutional issues to come before the Court.

Senator BAUCUS. Are there any institutional changes that you think should be made within the Court?

Senator BIDEN. You might as well let them know before you get there. [Laughter.]

Judge O'CONNOR. As the newcomer on the block I would hesitate to offer all those opinions. It would probably be inappropriate.

I am aware though that the Court has a greatly increasing caseload, and this is a concern I am sure because there are ever more decisions that have the potential for review and that need review, and the Court is limited by sheer virtue of numbers and hours in what can be done; this is a concern.

Senator BAUCUS. What in your view will be the most difficult question the Court will face in the next 25 years—the death penalty? Abortion? What will it be?

Judge O'CONNOR. I do not think I can answer that. It hears all the major issues of the day in one way or another. Most of those land before the Court, and it ultimately addresses most of those grave and serious concerns that this Nation faces in one form or another. I would not know which of those on reflection would turn out to be the most significant.

Senator BAUCUS. Thank you very much.

The CHAIRMAN. Judge O'Connor, I am sure you would agree that our constitutional form of government is probably the greatest form of government in the world. Many people feel that the Constitution is the greatest document ever written by the mind of man for the governing of a people.

In view of that I guess a good epitaph for a judge would be, "Here lies a judge who upheld the Constitution."

Judge O'CONNOR. I think that would be very apt, Mr. Chairman.

The CHAIRMAN. Thank you very much.

In view of that I think we can now recess, as we planned to, until 10 o'clock tomorrow morning.

[Whereupon, at 5:10 p.m., the hearing was recessed, to reconvene on Thursday, September 10, 1981, at 10 a.m.]

[Biography of Sandra Day O'Connor follows:]

BIOGRAPHY OF SANDRA DAY O'CONNOR

Birth: March 26, 1930; El Paso, Texas.

Legal residence: Arizona.

Marital status: Married; John Jay O'Connor III; 3 children.

Education: Stanford University; 1950, A.B. degree; 1952, LL.B. degree.

Bar: 1952, California; 1957, Arizona.

Experience: 1952–53, Deputy county attorney, San Mateo County, Calif.; 1954–57, Civilian attorney, Quartermaster Market Center, Frankfurt/Main, W. Germany; 1958–60, Private practice, Maryvale, Ariz.; 1961–64, Homemaker and childcare; 1965–69, Assistant attorney general, State of Arizona; 1969–75, State Senator, Arizona State Senate; 1975–79, Judge, Maricopa County Superior Court; 1979-present, Judge, Arizona Court of Appeals.

NOMINATION OF SANDRA DAY O'CONNOR

THURSDAY, SEPTEMBER 10, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:08 a.m, in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias, Laxalt, Hatch, Dole, East, Grassley, Denton, Specter, Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Baucus, and Heflin.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

The CHAIRMAN. The Judiciary Committee will come to order. The questioning of Judge O'Connor will now continue. Senator Grassley of Iowa is next in line. Senator Grassley.

Judge O'Connor, I remind you that you are still under oath.

TESTIMONY OF SANDRA DAY O'CONNOR, OF ARIZONA, NOMINATED TO BE ASSOCIATE JUSTICE, U.S. SUPREME COURT—Resumed

Judge O'CONNOR. Yes, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Chairman.

Welcome back, Judge O'Connor. According to the television last night, you did very well.

Unlike the other nominees, Judge O'Connor, you do not have a strong record on major judicial issues for us to review. That is not your fault; that is because you served on State courts as opposed to Federal courts. You have not served on the Federal court of appeals, as the Chief Justice did, or held the leadership position on policy matters that was evident from Justice Powell's position in the ABA or Justice Rehnquist's activities in the Justice Department.

All of us on this committee respect your obligation not to comment on certain matters but I hope that you will understand that in light of your lack of written record on major issues, it is our obligation in this hearing to attempt to insure that you do not prove as great a surprise to President Reagan as Earl Warren was to President Eisenhower. [Laughter.]

JUDICIAL PHILOSOPHY

Frankly, it has been my observation that every candidate for the Senate is a fiscal conservative and every nominee to the Supreme

Court is a strict constructionist but once they take their seat it may be an entirely different matter. That is true of the Senate as well as the Supreme Court. Therefore, this is really the only forum in which we as Senators can learn of your judicial philosophy, thereby allowing us to fulfill our duty in making a proper decision, and it is to that end that I proceed with some questioning.

I understand that part of your reason for not commenting on specific cases is that you may have to disqualify yourself from similar cases should they arise before the Court. As a part of your preparation for this hearing, did you read the statute that governs the kind of statements you are claiming privilege from making?

Judge O'CONNOR. Mr. Chairman and Senator Grassley, if you are referring to title 28, United States Code, section 455——

Senator GRASSLEY. Yes.

Judge O'CONNOR [continuing]. And the ABA canon 3(c), yes, I have read those. I have also, of course, been guided in large measure by my review of the positions taken by prior nominees to the Supreme Court when they have appeared before this body.

I am sure you know, Senator, that beginning with the earliest such occasions the nominees have felt reluctant to answer questions concerning issues that may come before the Court, and there are many expressions of that concern which have I think been called to our attention during the course of these proceedings.

Senator GRASSLEY. Are you familiar with Justice Rehnquist's comments in *Laird* v. *Tatum,* where respondents urged him to disqualify himself because of public statements he made about the constitutional issues that were raised in the case? He made these statements prior to his nomination as a Supreme Court Justice.

Justice Rehnquist's comments went on for 6 pages, citing not only the above statute but also various instances where Justices not only had commented publicly on substantive constitutional issues but actually had been principal authors of the laws that later came before the Supreme Court, before the Supreme Court decided the constitutionality of that law, for support for his position.

Have you reviewed the transcripts of confirmation hearings of other Court nominees who have appeared before this committee? You have indicated that perhaps you have done that.

Judge O'CONNOR. Yes, Senator Grassley, I have done that.

Senator GRASSLEY. As far as you know, is it true that no other member of the Supreme Court has ever had to disqualify himself from a case because of policy statements made outside of the courtroom?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I cannot answer that question. My review of the transcripts of the prior hearings reveals that the nominees have been rather careful in this area not to put themselves in that kind of a position.

In *Laird* v. *Tatum,* in which the question was raised and Justice Rehnquist had to address himself to it, it really related to certain statements that he had made prior to becoming a nominee for the Supreme Court. We do not live in a vacuum, of course, and I have served as a State legislator and as a trial court judge. Certainly, I would not expect that my statements or activities in that State legislative body or as a State trial court judge could fairly be said to disqualify me from sitting on a case subsequently on the United States Supreme Court, when some of those same issues would subsequently be addressed.

Basically, that is what Justice Rehnquist was discussing in *Laird* v. *Tatum* but I think it might be useful to also quote Justice Rehnquist from the same case, when he was discussing the situation of a nominee at a hearing such as this, in which he said:

> I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

In that paragraph I think Justice Rehnquist did try to distinguish the situation to which you refer; namely, statements or conduct that occurred prior to becoming a nominee versus the process following the nomination.

Senator **GRASSLEY**. Could I suggest to you that you did not read the entire quote, because in *Laird* Rehnquist noted that as to disqualification there is no difference between a nominee's statements and prior statements.

Judge **O'CONNOR**. Mr. Chairman, Senator Grassley, the quote that I have read I thought did correctly reflect and quote Justice Rehnquist's view of the situation of the nominee at the hearing. Indeed, my review of his own confirmation hearing would lend some substance to that view, wherein he on occasion had to consider the same troubling questions that we are considering now in the sense that there were some things which might come before the Court which he felt he was unable to address directly.

Senator **GRASSLEY**. He differentiates between propriety as opposed to disqualification, but at this point I do not care to follow that particular point any more except to ask you, in your process of reviewing nominees' reactions before confirmation hearings, did you have an opportunity to read Justice Powell's comments on *Escobido* and *Miranda* in his confirmation hearings?

Judge **O'CONNOR**. Mr. Chairman, Senator Grassley, yes, I did.

Senator **GRASSLEY**. I suppose, then, that you are aware of the fact that he did express an opinion and he was careful to make clear that it was at the time that he was head of or active in the ABA. At the time he said that he expressed the view that the minority opinions were much sounder than the majority opinions. He did express that in the confirmation hearings.

Judge **O'CONNOR**. Mr. Chairman, Senator Grassley, the practice of holding confirmation hearings really began with Justice Stone. It was dropped, I think, until Justice Frankfurter was nominated to the Court in 1937, and at the beginning of Justice Frankfurter's hearing he observed that he would not care to express his personal views on controversial issues affecting the Court.

When the Chief Justice, Chief Justice Berger was asked a question which might bear on how a conceivable case could be decided, he said,

> I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or before any other court on which I may sit. I think I must limit any comments in that way.

This is basically the thrust, Senator Grassley, of the nominees who have appeared before the Senate committees and have been questioned on matters which indeed might come before the Court.

Senator GRASSLEY. Do you feel that Justice Powell went further than he should have in his comments on the *Escobido* and *Miranda* case?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I am sure Justice Powell responded only in a manner which he felt was appropriate at the time.

Senator GRASSLEY. Judge O'Connor, could you tell us how many discussions you had with the President personally or by telephone prior to his announcement of your selection?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, yes: two.

Senator GRASSLEY. Can I ask you for how long a period of time those two were, approximately, in minutes?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, it would be really a speculation on my part because I was very engrossed, as you might imagine, in the conversation. I was not watching any clock or my watch.

We had a discussion at the White House—I am not certain how long that lasted—and we had a discussion on the telephone prior to the nomination.

Senator GRASSLEY. To the best of your recollection, what were some of the things that he asked you in those conversations?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I think it would not be proper for me to disclose the contents of private conversations which I had with the President about this matter.

Senator GRASSLEY. OK. Did he ask you any policy questions?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I really do not think that it is appropriate for me to relate what was stated, other than that I think it would be proper for me to assure you that I was not asked to make any commitments concerning any issue which might come before the Court.

Senator GRASSLEY. Would you repeat that, please?

Judge O'CONNOR. I was not asked to make any commitments, Senator Grassley, about what I would do or how I would resolve any issue to come before the Court. I think it would be proper for me to assure you of that.

Senator GRASSLEY. Well, could you generalize to any extent? Was any of the conversation that you had with the President similar to any of the things that the members of this committee are asking you?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not properly reveal the content of those conversations.

Senator GRASSLEY. Did the President ask you not to discuss that conversation?

Judge O'CONNOR. Mr. Chairman, Senator Grassley, I would suggest that I should not reveal the contents of the conversation but I am in no way suggesting that that was at his request. That is my perception of what is proper.

COURT-ORDERED BUSING

Senator **Grassley**. Judge O'Connor, yesterday we heard your personal views on some issues. I really was hoping to have not your personal views but how you might express your judicial philosophy, and general approaches to things that might come before the Court.

You did give us your personal view on at least one issue, the subject of abortion. Since we are going to probably cast a vote for or against you based upon your personal views more so than statements of substance that we would get on issues that may come before the Court, could I ask you for your personal views on busing, forced busing?

Judge **O'Connor**. Mr. Chairman, Senator Grassley, I assume you mean in the context of the court-ordered busing in connection with school desegregation cases?

Senator **Grassley**. Yes.

Judge **O'Connor**. Mr. Chairman, Senator Grassley, as you are probably aware, again any comments that I would make on this subject about my personal views have no place in my opinion in the resolution of any legal issues that might come before the Court.

Senator **Grassley**. OK. No; I want your personal views in the same vein, in the same context and in the same environment you gave us your personal views on abortion. I would like to have your personal views on busing.

Judge **O'Connor**. Speaking to that end, perhaps illustrative of that is the position that I did take in the legislature when I had occasion to vote in favor of a memorial that requested action to be taken at the Federal level to terminate the use of forced busing in desegregation cases.

This is a matter of concern, I think, to many people. The transportation of students over long distances and in a time-consuming process in an effort to get them to school can be a very disruptive part of any child's educational program.

In that perhaps I am influenced a little bit by my own experience. I grew up in a very remote part of Arizona and we were not near any school. It bothered me to be away from home to attend school, which I had been from kindergarten on. In the eighth grade I attempted to live at home on the ranch and ride a schoolbus to get to school. It involved a 75-mile trip each day, round trip, that is, and I found that I had to leave home before daylight and get home after dark.

I found that very disturbing to me as a child, and I am sure that other children who have had to ride long distances on buses have shared that experience. I just think that it is not a system that often is terribly beneficial to the child.

Senator **Grassley**. Thank you, Judge O'Connor. My time is up.

The **Chairman**. The Senator from Alabama, Senator Heflin.

Senator **Heflin**. Thank you, Mr. Chairman.

Judge O'Connor, following the line of questioning that Senator Grassley pursued in regard to your meetings and conversation with the President, did the President offer you any jellybeans? [Laughter.]

Judge O'CONNOR. Mr. Chairman, Senator Heflin, in the Oval Office I was seated next to the jellybeans but I confess to you that I was more interested in what was being said. [Laughter.]

POLICE POWER AND INDIVIDUAL RIGHTS

Senator HEFLIN. For any person going on the Supreme Court, there is a real problem that any court must face between individual rights and police power. I suppose this issue has been an issue that has confronted the Court and each individual member of the Court since the Court has really been in being.

It is the issue, of course, of the police power of the State and the issue of the police power of the Federal Government within its jurisdiction. There is the issue of constitutional rights, individual rights. There are rights that are not expressly contained within the Constitution and the amendments thereto but that have developed, such as the right of privacy.

I wonder if you would express to us your general philosophy in making decisions dealing with the conflict between the police power and individual rights?

Judge O'CONNOR. I assume you are speaking in terms of, for instance, legislation enacted for example within the police power jurisdiction of State government?

Senator HEFLIN. Well, for example, with all of our crimes, practically all of the crimes in the States, the issue arises sometimes in the language, sometimes in the application. It raises the issue of individual rights versus police power of the State.

Judge O'CONNOR. Mr. Chairman, Senator Heflin, I suppose the normal standard for review, of course, which is applied by the Court is whether the particular legislative enactment that is being reviewed bears a rational relationship to a legitimate State objective. Traditionally, if it does the enactment is upheld.

Obviously when we are dealing with some rights, for example, under the first amendment—the right of free speech or the right under the establishment of free exercise clauses, something of that sort—the Court has adopted I think a rather more stringent set of tests to determine whether those rights have been preserved. We could examine each of those individually, for instance, in the free speech area or the freedom of religion area because the Court has been rather more specific in those areas. However, just in broad, general terms, absent one of those special rights, the Court has tended to apply the usual test for the most part in determining whether a particular piece of legislation should be upheld.

Now if the legislation, either on its face or if determined by the trier of fact, was intended to be discriminatory against a particular group of people—for instance, on the basis of race or on the basis of national origin, and in some cases on the basis of alienage—the Court has applied a much stricter test in reviewing that legislation and indeed has looked to see whether that particular provision, discriminatory provision, is necessary to achieve a compelling State interest or governmental interest.

In the area of discriminatory legislation on the basis of gender, the Court has applied a sometimes shifting standard to determine how to review those cases, something in between the strictly suspect standard and the rational basis standard.

TENTH AMENDMENT

Senator **Heflin**. Thank you.

The early decisions of the Supreme Court have recognized the essential role of the States in our Federal system of government. Justice Chase in the case of *Texas* v. *White* declared that "The Constitution in all of its provisions looks to an indestructible Union composed of indestructible States."

You know that the 10th amendment reserves to the States and to the people the powers not specifically delegated within the Constitution. At the same time, it has been recognized that the Constitution has granted plenary authority to the Federal Government to do all that is necessary and proper to carry out the express powers enumerated in the Constitution.

In light of these provisions, I would like to know your general philosophy of the role of the Judiciary in preserving Federalism.

Judge **O'Connor**. Mr. Chairman, Senator Heflin, the judiciary in my view has an important obligation in that regard. The Federal Government was the outgrowth or product of the States' willingness to band together and form a Federal Government, and it of course assumed that it had created a Federal Government of limited powers and, indeed, had delegated expressly to the Federal Government those powers that the States then thought were appropriate, and reserved in the 10th amendment to the people and to the States those powers that were not delegated.

I guess we would have to say that it is under the 10th amendment, really, that the States exercise their broad police power which has been generally regarded as a reserve power to the States. The Court through the years has not, at least in recent decades, given much specific—or, has not based many decisions on the 10th amendment.

I think I mentioned yesterday, perhaps, the one instance that comes to mind in recent years in which the Court invalidated a congressional enactment as it applied to the States, and that was in the *National League of Cities* v. *Ussery* case, in which the Federal Government had attempted to apply the wage and hour law to State employees and the Court drew the line in that instance.

It more recently, however, declined to rely on the 10th amendment to invalidate congressional enactments in the area of surface mining regulation, and said that in that instance the Congress was addressing its primary thrust to the regulation of business or private interests as such and not attempting to regulate the States as States.

I am sure that we have not seen the last of the inquiries that the Court will make, by any stretch, into the application of the 10th amendment, but it sets forth a very vital pronouncement of the role of the States in the Federal system and indeed—as a product if you will of State government, which I am—I have some concerns about seeing that State governments and local government are maintained in their abilities to deal with the problems affecting the people. The reason for that philosophically is because I think I would agree with those who think that the government closest to the people is best able to handle those problems.

Now I guess time will tell the extent to which the Court and the Federal courts generally will rely upon the 10th amendment in their resolution of some of these problems.

ADMINISTRATIVE LAW

Senator **HEFLIN**. There has developed—and it has developed and is prevalent today—a tremendous number of adjudications that take place outside the formal judicial system of the Federal Government. What I am referring to are the administrative agencies. There are many people today who feel that problems are presented because administrative agencies occupy the position of investigator or prosecutor, judge, trial judge, all combined in one.

Of course, the administrative law judge system has developed. There are many people who feel that there is neither the independence nor the appearance of independence in that system. I wonder if you have any ideas as to what could be done to give more independence, more impartiality to the decisions that are made in the administrative agencies, and the scope of review by the courts which is basically within the circuit courts of appeals. Do you have any thoughts on this issue?

Judge **O'CONNOR**. Mr. Chairman, Senator Heflin, it is a very important subject. Much of the contact which the public has with government in general, whether it is at the State or the Federal level, is through the administrative branches of government. These are the arms of the Federal agencies and the State agencies that are actually administering the policies established by the legislative body.

As you pointed out, the practice in administrative law is to have the agency itself sit in judgment of any disputes that come with relation to that agency's regulation of the public, and many people find that that is a little bit difficult to accept in terms of having a fair and impartial resolution of their problems. That concern is understandable.

Nevertheless, it appears to be rather firmly entrenched in both the State and Federal systems. The question then becomes, how do you make it more workable? I think there is discussion, certainly, at various State levels and perhaps nationally about the extent to which you can set up impartial tribunals that are not part and parcel of the administrative agency itself to hear resolutions of the problems; discussions about whether it would serve the governmental bodies well to set up an entirely separate administrative tribunal that could serve as the trier of fact, if you will, for a number of agencies rather than just each agency administering its own. I think that these things have merit.

I believe that the Congress is also considering certain amendments to the standards of review in existence for administrative agency decisions. Typically, the standard of review has been to overturn the administrative decision only if there is an abuse of discretion made, and great weight is given to the determinations of the administrative agency. Now clearly, it would be within the legislative function to alter that standard, to have—I suppose if the review were had de novo, that is nonproductive because it forces such a load on the courts but maybe something in between can be considered. Maybe we do not need to grant any presumptions of validity.

These are matters that I think are relevant for current discussion and perhaps merit discussion because there is a great deal of concern in the public generally about the field of administrative law.

CASE LOAD

Senator HEFLIN. One other question: I will have to maybe give you a brief background for it. In 1890 the U.S. Supreme Court had filed with it approximately 550 cases. They asked for relief. In 1891 the nine circuit courts of appeal were established to give it relief. After taking cases from the Supreme Court into those circuit courts of appeal, the U.S. Supreme Court determined 275 cases in 1891. Some of those cases were summarily decided without opinion; approximately two-thirds were decided with opinion.

Last year the Supreme Court took approximately 275 cases and has consistently taken approximately 275 cases since 1891. Cases filed with the Supreme Court last year were something in the neighborhood of 4,200, as compared to about 550 in 1891. The granting of cert or the mandatory jurisdiction that had to be exercised in those regards constituted about less than 7 percent of the cases that were filed with it. I suppose, looking over the fact that 275 cases has been almost the norm since that period of time but that the population has increased the number of cases, certainly we are more litiguous today than we were then.

You have had experience as a member of a court of appeals of your State in which I suppose that the supreme court of your State reviewed the decisions of your court of appeals. Is that correct?

Judge O'CONNOR. Correct.

Senator HEFLIN. Do you have any suggestions pertaining to the discretionary cases that the Supreme Court takes or a remedy for the overall problem? Largely, the Supreme Court today has to select the ones that they feel are important to society in general. Many cases that they might want to take, they will not take.

We also know that we have had two studies of the Fraun proposal, and the Ruska Commission had worked on this. Do you have any thoughts pertaining to some method of relief to the U.S. Supreme Court, and relief to the public and to the litigants that file, where they have cases that cry out for consideration?

Judge O'CONNOR. Mr. Chairman, Senator Heflin, I believe that you have personally been involved in an in-depth review of this area. You likewise have come from a State court system in which you have taken a great personal interest in the affairs of the administration of justice and I think are very well informed on the subject.

However, you have pointed out the extent and really dramatic nature of the problem which the Court presently faces in terms of sheer numbers. Several things I suppose are possible. One of the things that is being studied and considered, I am told, is a national court of appeals, something in between the Federal courts of appeal and the Supreme Court which conceivably could assimilate some additional number of the issues that need to be resolved, at least to the extent that we have differing opinions among the various Federal courts of appeal.

This is certainly one possibility, one that would have to be studied with a great amount of care in terms of determining what its jurisdiction would be, whether in fact it would alleviate the situation or not, what types of cases it would really handle. Justice James Cameron of our Arizona Supreme Court has done some work in this area as well and is publishing something on the subject currently.

Another possibility, it seems to me, would be to consider removal of the mandatory jurisdiction of the U.S. Supreme Court. As you know, some cases must be accepted on appeal. Possibly giving the Court the opportunity to have entirely discretionary jurisdiction on appeal could be helpful in the long run.

Whether there are other things that can actually curtail the tremendous problem we are having with numbers, I do not know. One would like to think that with less extensive regulation, that perhaps at some point some issues would become settled and would no longer become the subject of as much litigation as we have, so maybe we have to approach it from all aspects. Maybe we are encouraging litigation at the bottom level at the same time we are trying to solve the problem at the top.

Senator HEFLIN. Thank you.

The CHAIRMAN. Senator Denton of Alabama.

Senator DENTON. Thank you, Mr. Chairman.

Good morning, Judge O'Connor.

Judge O'CONNOR. Good morning.

Senator DENTON. We have had references to this being an ordeal, an inquisition. I do congratulate you on your endurance and your poise, your graciousness. I would like it known that I do not feel like an inquisitor; I do not feel condescending.

I had a little scrapbook of sayings which sort of guided my life. They were printed, three or four of them, in a newspaper article once and they were included in a book I wrote. One of them was, "An officer should wear his uniform as a judge his ermine—without a stain."

Therefore, I have a tremendous respect for your profession, for your position. I have a tremendous respect for you as a woman who has fulfilled the indispensible roles of wife and mother in such a successful way, and then has gone on to extrapolate into fields of professional accomplishment which would amount to, in my opinion, in sum constituting pretty much an ideal woman. I ask you these questions with that feeling toward you.

The other gentlemen here have asked you questions about such subjects as judicial activism, civil rights, separation of powers, because respecting you at least as much as I, they are concerned about matters which affect the welfare of this country vis-a-vis the prospect of your nomination.

I am compelled to ask, for the same reason, about abortion. As I ask, I have in mind the cultural shock of my returning to this country after almost 8 years away from it. We had changed in a lot of ways, as you could probably imagine—we talked about this together—from 1965 to 1973. It was, I think, a devastatingly accelerated sort of self-degradation period which I believe we are tending to recover from.

Among the changes I noted was the abortion issue, abortion being totally accepted, although the ruling had been a little earlier. It was just an accepted thing, and it was appalling to me but not as appalling as it is today. In other words, I have gone through a recognition of how important abortion is, since 1973 to now, a much greater appreciation for what it consists of.

I did not understand why there was so much concentration on abortion, for example, by the Catholic Church in 1973 when I returned. I thought, "Why are they picking on that instead of some of the other things that are going on, the massage parlors, the absolute free sex thing, the perversion? Why abortion?"

I gradually found out, just from thinking about it, but I did note that, you know, for thousands of years in Judeo-Christian society abortion was about the worst word you could say. In the Navy we used to have an expression: "That plan is an abortion." It was the worst condemnation you could give to it in 1960, and all of a sudden when I come home in 1973, you do not say that any more. It is totally outmoded.

What remarkable enlightenment occurred to mankind to make that happen in Judeo-Christian society, I did not understand, and still do not. I am concerned about it in other ways, as I expressed yesterday and might express again today.

Based on my earlier conversation with you and your testimony up to this time, it is my belief that you have changed your position on abortion since you were in the Arizona Legislature. Under what conditions do you now feel abortion is not offensive?

Judge O'CONNOR. Mr. Chairman, Senator Denton, for myself it is simply offensive to me. It is something that is repugnant to me and something in which I would not engage. Obviously, there are others who do not share these beliefs, and I recognize that. I think we are obligated to recognize that others have different views and some would draw the line in one place rather than another.

Senator DENTON. That is the line I am asking you about: In your personal view, where do you feel abortion is not offensive in the respect of drawing that line? We here in the Congress have had to think in those nitty-gritty terms. Each individual in the world, really, and the United States in particular, is thinking in those terms now. It is an agonizing question, and I do respect the differing points of view of others. I do know that I came through several transition periods myself but I am asking you where you now are in drawing that line. Where is it inoffensive?

Judge O'CONNOR. Mr. Chairman, for myself I have to draw it rather strictly. I am "over the hill." I am not going to be pregnant any more, so it is perhaps easy for me to speak. For myself, I find that it is something in which I would not engage.

For those in the legislative halls, it poses very difficult problems for them in drawing those lines legislatively. They are presently constrained, of course, by the limitations placed on by the Court in the *Roe* v. *Wade* decision, and if you were to draft legislation today I suppose it would have to be drafted with that case in mind while it remains on the books.

Senator DENTON. Well, with all due respect, we are dealing with such nitty-gritty distinctions as rape, incest, and so forth, save the life of the mother. I am asking your personal reflection on the inoffensiveness with respect to those kinds of conditions. Where do you think it occurs? Where does it become inoffensive? I realize that this is not with respect to you, your personal body, but with respect to justice or compassion, the sum of which you view life with.

Judge O'CONNOR. Mr. Chairman, Senator Denton, it remains offensive at all levels. The question is, what exceptions will be recognized in the public sector? That is really the question.

Senator DENTON. Where do you feel that the possibility should occur?

Judge O'CONNOR. I find that it is a problem at any level. Where you draw the line as a matter of public policy is really the task of the legislator to determine. Would I personally object to drawing the line to saving the life of the mother? No; I would not. Are there other areas? Possibly. These are things that the legislator must decide.

Senator DENTON. Well, candidly, personally, in terms of a tubal pregnancy with the impossibility of delivering that fetus, the operation to take it from the mother can be viewed as an abortion to save the life of the mother. I want to confess that I am in favor of that activity. I would not refer to it as abortion, but I want to say that you are more conservative than I in the answer you just gave.

Do you feel that your present attitude will remain as a final position? If not, which way do you feel likely to trend on the issue?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I cannot answer what I will feel in the future. I hope that none of us are beyond the capacity to learn and to understand and to appreciate things. I do not want to be that kind of a person. I want to be a person who is open-minded and who is responsive to the reception of knowledge.

I must say that I do expect that in this particular area we will know a great deal more 10 years from now about the processes in the development of the fetus than we know today. I think we know a great deal more today than we knew 10 years ago, and I hope that all of us are receptive and responsive to the acquisition of knowledge and to change based upon that knowledge.

ROE VERSUS WADE DECISION

Senator DENTON. Retrospectively, do you feel comfortable about the correctness of the *Roe* v. *Wade* decision?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I do not quite know what that question means. If you mean, am I unaware of the concerns that have been expressed about it, of course I am aware of the concerns that have been expressed.

Senator DENTON. What I mean is, as a person are you comfortable with the status quo of sort of psychological environment, peer pressure about what is right and wrong, that that decision has left?

Judge O'CONNOR. Mr. Chairman, Senator Denton, I am concerned about the extent of public concern about that issue. Obviously, law which does not have a broad consensus, if you will, is always a concern to us because we are here in a broad sense in Government as servants of the people. Lawmakers, it seems to me, have to be concerned about the views of the public generally and about broad segments of the public who feel strongly about certain issues. That is vitally important in the lawmaking field.

I think that the judicial branch is, of course, designed to be not directly responsive to public pressure, and rightly so. I think all of us would concede that it would be unwise to have courts try to resolve public issues in a given case that is before the courts on the basis of public sentiment but, of course, it is always a concern to us and should be a concern to us when there is a broad level of public discontent about some issue.

Senator DENTON. Well, a great many people regard the *Roe* v. *Wade* decision as the most extreme example or one of the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. As I understood you earlier in your answers, you were in favor of a judge ruling from those bases rather than from what had become, perhaps temporarily, a public perception in terms of what is OK and not OK.

Judge O'CONNOR. Mr. Chairman, Senator Denton, yes, I do feel that a judge is constrained by the processes surrounding the judicial system to resolving issues based on the framework of the particular case that has come before the judge, the particular facts, the particular statute, and the law applicable to those.

WOMEN SERVING IN COMBAT

Senator DENTON. Would you give your present personal position with respect to women serving in actual military combat or ships and planes which would likely become involved in combat?

Judge O'CONNOR. Mr. Chairman, Senator Denton, it seems to me that consistent with the recommendation I made when I served on the Defense Advisory Committee on women in the service, that the term "combat" should be specifically examined with regard to specific assignments, and that women should be considered if they are in the military for service on assignments taking into account their ability and the specific mission to be performed.

I did not favor and do not favor today a complete exclusion, for example, of any women naval personnel from a ship merely because it is a ship and it is in the U.S. Navy. I think that it has to be examined much more closely than that, and that process has in fact been occurring and it is one which I think is appropriate.

Senator DENTON. My question was not directed toward the Dacowits testimony, with which I am familiar, but just your personal preference. Assuming that we knew whether or not a woman would be committed in combat, would you be for or against that commitment?

Judge O'CONNOR. Mr. Chairman, Senator Denton, speaking as a personal matter only, I have never felt and do not now feel that it is appropriate for women to engage in combat if that term is restricted in its meaning to a battlefield situation, as opposed to pushing a button someplace in a missile silo.

Senator DENTON. In other words, you would not want them to be in a position to be shot?

Judge O'CONNOR. To be captured or shot? No, I would not. [Laughter.]

Senator DENTON. Well, it may astound this audience, but at the Naval Academy not too many months ago there were young ladies standing up and demanding to be placed in just that position, and saying that that was their right to do so because they were accepted into the Naval Academy, so it really is not all this laughable, you know. I am glad to hear that is your opinion, Judge O'Connor.

Yesterday in describing yourself as a judge, you said that two of the characteristics that have stood you in good stead over the years are a short memory and a tough skin.

I see my time is up. I will be asking you something about the Starr memorandum in the next session. I thank you very much, Judge.

The CHAIRMAN. The Senator from Pennsylvania, Mr. Specter.

DEATH PENALTY

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge O'Connor, I compliment you on your tour de force of yesterday. I think that indirectly you have answered a number of questions, with respect to capability, by the preparation and legal skill that you have demonstrated with your answers, and with respect to your temperament, your good health, and stamina.

Did you have occasion while in the Arizona Senate to vote on the death penalty issue?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes, I did, I think more than once.

Senator SPECTER. How did you vote?

Judge O'CONNOR. Mr. Chairman, Senator Specter, after the *Furman* v. *Georgia* case, which basically overturned a good many State death penalty statutes for all practical purposes, Arizona along with other States engaged in an effort to reexamine its statutes and determine whether it was possible to draft a statute which would be upheld by the Supreme Court in the wake of *Furman* v. *Georgia.*

I participated rather extensively in that effort, in a subcommttee which actually put together the language that was ultimately adopted in the State legislature for reenactment of the death penalty in Arizona. I voted for that measure after it was drafted and brought to the floor. I subsequently had occasion to, in effect, apply it as a judge in the trial court in Arizona in some criminal cases.

I had previously participated in a vote on another death penalty bill that I recall that may have come about before the one in the wake of *Furman* v. *Georgia,* and that was a proposal to enact some mandatory penalties in certain situations. My recollection is that I voted against that proposal.

Senator SPECTER. Have you changed your views since you voted in favor of the death penalty?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I felt that it was an appropriate vote then and I have not changed my view.

PRETRIAL BAIL

Senator **Specter**. Judge O'Connor, have you had occasion to set pretrial bail?

Judge **O'Connor**. Mr. Chairman, Senator, yes, I have; not often, but I have.

Senator **Specter**. In the setting of pretrial bail, did you consider the dangerousness of the defendant or did you limit your consideration to his likelihood of appearing at trial?

Judge **O'Connor**. Mr. Chairman, Senator, the circumstances in which I was called upon to set bail all related to some murder charges in which, under Arizona's statutory provision, the judge also considers, if you will, the nature of the evidence against the defendant and other factors in setting bail.

I am aware of the current discussion that is going on at the Federal level generally about whether dangerousness should be considered as a factor, and indeed whether it can be under the eighth amendment and the prohibition against excessive bail.

Senator **Specter**. When you set the bail, did you consider the issue of dangerousness to the community in your evaluation of the bail?

Judge **O'Connor**. Mr. Chairman, Senator, only indirectly, I suppose, because what I was considering was the fact that it was a death case and the extent of the evidence which had been obtained. Upon the strength of that, the bail was determined, so indirectly dangerousness perhaps was a factor.

PREVENTIVE DETENTION

Senator **Specter**. Judge O'Connor, what are your philosophical views about bail and preventive detention as that concept may conflict with the presumption of innocence in criminal trials?

Judge **O'Connor**. Mr. Chairman, Senator, these matters are certainly presently being debated and considered here, I believe, as well as in the courts. Unless I am mistaken, there is a case now awaiting action at the U.S. Supreme Court on a petition for certiorari, possibly, from the District of Columbia area involving the validity of the District of Columbia amended bail statute. Therefore, I would be reluctant to indicate a particular view on the validity of that but I would indicate to you my broad personal concern as it reflects upon individual liberty.

It seems to me that all of us come to the judicial system encumbered, if you will, by our previous known activities. If people have been previously convicted of offenses and these convictions are known, or if for example someone has been charged with an offense and released on bail and then charged again with another offense and these factors in the record are known, these things perhaps—speaking purely as a matter of personal belief and not as a reflection on the legal issues involved—possibly merit consideration in the determination of bail.

FUNDING FOR JUVENILE CRIME

Senator **Specter**. Judge O'Connor, with admittedly limited resources available, what priority would you personally assign to funding for juvenile crime prevention as contrasted with other aspects of the criminal justice system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I would assign a high priority to that particular area. One reason I would do so is because the great bulk of crime is committed by people who are very young and it seems to me that we need to concentrate our efforts on that particular age group. If there is something we can do at an early age to discourage a criminal career, it is all-important, because I think the public is very, very distressed with the extent of crime in this country. Indeed, I regard it as one of the most serious problems that we have in this Nation and I would like to see effort devoted to prevention of crime at an early age.

LIKELIHOOD OF REHABILITATION

Senator SPECTER. Does your experience in the criminal court suggest to you that there is a better likelihood of rehabilitation among juvenile offenders?

Judge O'CONNOR. Mr. Chairman, Senator Specter, yes. I think the earlier you reach an offender, the first time something happens if something effective can be done you have a better chance of stopping a subsequent repetition of that offense.

Senator SPECTER. Judge O'Connor, do you think that it is appropriate for Supreme Court Justices to be advocates for social reform, as Chief Justice Burger has been for improvements in the correctional and prison system?

Judge O'CONNOR. Mr. Chairman, Senator Specter, it does seem to me that the Chief Justice has a significant role to play in expressing views on the administration of justice and on matters closely related thereto. It seems to me that that is something that all of us in this Nation can value and can benefit from.

Senator SPECTER. Do you think it appropriate for Supreme Court Justices to participate in other activities, as Chief Justice Warren did on the Warren Commission, or Justice Roberts did on the Pearl Harbor Commission, or Justice Jackson did at Nuremburg?

Judge O'CONNOR. Mr. Chairman, Senator Specter, that bothers me somewhat. I just wonder how there is time to do anything like that. As I view the work of the Court, I wonder that there is time to eat much less engage in a lot of other outside activities.

LIMITED JURISDICTION

Senator SPECTER. Judge O'Connor, if the Congress can limit the jurisdiction of the Supreme Court on constitutional issues, as you say ex parte *McCardle* suggests, how can the U.S. Supreme Court maintain its role as the final arbiter of the Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I do not think that I have suggested that that line has been finely drawn by the Court. It has not been reexamined, really, since ex parte *McCardle,* and I did not mean to suggest or imply that that is a fixed, final position because that issue is very likely to be addressed.

However, I have also expressed yesterday my concerns that to the extent that the Supreme Court lacks appellate jurisdiction to resolve some area of the law, then we no longer would have a capacity within the Federal judicial system to have that Court determine, indeed, what is the proper interpretation of a particular provision, or the law in the area from which its jurisdiction has been taken. This of course should be a concern to people in reviewing proposals for deprivation of jurisdiction.

Senator SPECTER. Well, in your testimony yesterday you left open that aspect of an interpretation of ex parte *McCardle*. My question to you is, how can the jurisdiction of the Court be limited on constitutional issues, given the Court's responsibility under the Constitution? Is there anything that is an open issue there to be decided?

I am not asking you for a preview on your judgment. I am asking you, if there is any justiciable issue there? Is it not plain that the Court must retain jurisdiction over constitutional issues and that the Congress cannot possibly eliminate that jurisdiction if we are to preserve the role of the U.S. Supreme Court on constitutional issues?

Judge O'CONNOR. Well, Mr. Chairman, Senator Specter, these are the concerns that I have tried to express that I think have to be considered, of course, in connection with any discussion of the limitation of the Court's jurisdiction. My effort was simply to point out that we really do not have much to look at after ex parte *McCardle*, which was a case which did uphold, as you know, the withdrawal of jurisdiction of the Supreme Court from considering appeals in habeas corpus matters. That affected a pending appeal. The Court simply upheld that particular exercise, and we have very little since then.

As I tried to explain, I think the constitutional scholars who have written on this subject have come to different conclusions as to the extent to which subject matter jurisdiction can be removed.

Senator SPECTER. Judge O'Connor, is it not inevitable for the Supreme Court to be influenced, at least to some extent, by considerations of social policy when the Court interprets the U.S. Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, in one sense we are all the product certainly of our experiences. People assume the role of judge encumbered, if you will, by the product of those experiences. Judges do, I suppose, as has been pointed out, read newspapers and listen to radio and watch television to some extent, so all are influenced to some greater or lesser degree by those experiences.

However, the framework within which a given case is decided should, in my view, be limited to the record and to the briefs and the arguments, and should not really be resolved on the basis of outside social concerns, if you will.

Senator SPECTER. I thought the questioning and your responses yesterday on *Brown* v. *Board of Education, Plessy* v. *Ferguson*, and the exclusionary rule were very enlightening, so I took occasion last evening to go back and reread *Brown*. I would disagree respectfully with your suggestion that the Court in *Brown* rested on a more intensive look at the origin of the 14th amendment. Without citing the direct language, I think the holding is very plain that the Court was looking to the effect of segregation on public education.

With respect to the exclusionary rule and what you described as a judge-made rule, *Mapp* v. *Ohio* was based on constitutional grounds and I think explicitly by the holding.

When you consider the intervention of the Supreme Court in the criminal field starting with *Brown* v. *Mississippi* and its prohibition against forced confessions, which neither the legislature of Mississippi or the Congress of the United States had addressed—I am just wondering if under your interpretation of "strict construction" you would not agree that there is an avenue and an opening where even the most strict constructionists would look to social policy in the decisions of the U.S. Supreme Court in meeting issues to which the Congress or State legislatures have not directed their attention?

Judge O'CONNOR. Mr. Chairman, Senator Specter, I simply would acknowledge that to a degree that has occurred.

Senator SPECTER. Don't you think it is proper—if you take a strict constructionist like Justice Harlan in *Brown* v. *Board of Education,* and we could give a lot of other examples—that however strict a constructionist may be, there is some latitude appropriately to consider public policy or social policy in interpreting the Constitution?

Judge O'CONNOR. Mr. Chairman, Senator Specter, it is a factor in the sense that it is properly brought before the Court, and I have indicated to you that I think in the presentation of cases these matters are brought very poignantly to the Court through the briefs and through the arguments. To that extent, obviously, they are considered in that sense but by an appropriate mechanism, I suggest to you.

The suggestion that the Court should look outside the record in the presentation of the case in an effort to establish or consider social concerns or values, is what I have indicated I think would be improper in my view.

Senator SPECTER. Thank you very much, Judge O'Connor.

Thank you, Mr. Chairman.

PRAYER IN PUBLIC SCHOOLS

The CHAIRMAN. Thank you.

We shall now begin the second round of questions.

Judge O'Connor, I shall propound certain questions to you but I want to make it clear that if you feel that any of these questions would impinge upon your responsibilities as an Associate Justice of the Supreme Court, then you say so after the question is asked and before any answer is expected.

Judge O'Connor, the first amendment forbids the establishment of a State religion. The first amendment also prohibits interference with the free exercise of religion. This second prohibition is often overlooked. Please share with us your views on the free exercise clause as it relates to, first, prayer in public schools.

Judge O'CONNOR. Mr. Chairman, as you know the Court has had occasion in several instances to consider the State action, if you will, in connection with prayer in the public school system. The Court has basically determined that it is a violation of the first amendment, both the establishment and free exercise clause, to mandate a particular prayer, even though it is nondenominational in character, for recitation by the pupils on a regular basis. The Court has even so determined despite the fact that an individual pupil may ask to be excused from that exercise.

In succeeding cases the Court has also prohibited the required Bible reading in the public schools as part of a regular program. I do not think it has prohibited, however, reference or reading the Bible in connection with other studies, for example, of history.

These cases of the Court have been the subject of an enormous amount of concern by the public generally. That concern, I think, is reflected because of the many connections that we have as a people with religion. I think this Senate opens every one of its sessions with a prayer. Certainly every session of the Supreme Court opens with a statement concerning the role of God in our system. We have a motto in this country of "In God We Trust." We refer to God in our pledge of allegiance.

I think the religious precepts in which this country was founded are very much interwoven, if you will, throughout our system. That is why the resolution of these problems under the first amendment has been very difficult.

I think at the present time the Court has indeed restricted the recitation of prayers in the public school system which in any sense are part of the public school program, despite the free exercise clause. This has given rise, of course, to different constitutional amendment proposals on occasion that have been considered in this Congress. At the present time the Court rulings continue to stand.

CHARITABLE EXEMPTION

The CHAIRMAN. Now would you share with us your views on the free exercise clause as it relates to the use of the Federal taxing power to pressure religious schools.

Judge O'CONNOR. Mr. Chairman, I believe that what you are referring to probably is the action by the Internal Revenue Service to withdraw the charitable exemption status under section 501(c) of the Internal Revenue Code to a particular school or schools, based on alleged policies of admission of pupils to those schools. At least I understand that there have been some such instances.

Speaking very generally only, the Internal Revenue Service policy in this regard has been said, I believe, to raise questions in the area of the extent to which the Internal Revenue Service should be a revenue-collecting agency as opposed to an agency concerned with public policy issues; and secondarily issues concerning the extent to which the Internal Revenue Code authorizes IRS to effectuate those policies.

Now I believe that there are at least two cases in which petitions for a writ of certiorari raising these issues are presently pending before the Court, and I would anticipate that action would be forthcoming with regard to those petitions, Mr. Chairman.

FIRST AMENDMENT DOES NOT EXTEND TO OBSCENE MATERIAL

The CHAIRMAN. Judge O'Connor, the Supreme Court has consistently held that obscene material is not protected by the first amendment. What are your views on the application of the first amendment in the area of pornography?

Judge O'CONNOR. Mr. Chairman, generally speaking, I think the law is established by virtue of the cases that have been handed down in this area, that the first amendment right of free speech does not extend to obscene material. The problem has been, of course, in the definition of what is obscene.

It would be very tempting to quote from Justice Potter Stewart on that subject, but I will refrain and mention only that I think the most recent determination of the court on what is obscene is found in *Miller* v. *California*, in which the Court laid down basically three tests to consider in determining what is obscene.

That includes, I believe, an examination as to whether the average person applying contemporary community standards would find the subject obscene or appealing to the purient interest; and, second, whether the act in question or material in question depicts patently offensive sexual conduct as specifically defined by State law; and then, finally, an examination as to whether the material has any underlying literary or scientific or other value. Having applied those tests, if it is determined then that the material is obscene, the Court has held that its distribution or sale can be restricted.

I, in the legislature, had occasion to attempt in various years to prepare and consider legislation in Arizona which would be in compliance with the Supreme Court's holdings on obscenity, and believed that as a matter of public policy the distribution of material which in fact is obscene is undesirable, and particularly with respect to distribution to minors.

The CHAIRMAN. Judge O'Connor, in response to an earlier question from Senator Hatch you emphasized, and I believe correctly, the importance of seeking the intent of the original framers when faced with the need to interpret a provision of the Constitution. The Supreme Court is also called upon to construe specific statutes.

What is your approach in construing specific statutes? Would you feel constrained by the language of the statute and the legislative history or would you feel empowered to imply or create a consensus that might not have existed in the legislative branch?

Judge O'CONNOR. Mr. Chairman, it seems to me important in construing statutes that the Court look at the specific legislative enactment itself, the language used, and any legislative history which is available in connection with it, as aids in the proper interpretation. These are crucial factors.

The difficulty arises, I suppose, when the legislative history does not cover the particular question and where the language is somehow confused or conflicts with some other statutory provision which has been enacted. In those instances I think the Court simply has to rely on traditional means of interpreting statutes.

RIGHT TO KEEP AND BEAR ARMS

The CHAIRMAN. Judge O'Connor, as you know the second amendment to the Constitution states that "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." In light of that constitutional prohibition, to what extent if any do you feel that Congress could curtail the right of the people to keep and bear weapons that are of value in common defense?

Judge O'CONNOR. Mr. Chairman, this question is one that has not been addressed very often in the courts. I think I recall only one instance, and that was in *United States* v. *Miller,* which was a very long time ago in the 1930's. The Court had to consider the National Firearms Act of 1934, which was an enactment of Congress, and it restricted as I recall the carrying of certain types of guns in interstate commerce. The Court upheld that enactment and said that the second amendment did not guarantee the right to people to have any certain type of weapon or arms.

I do not know that we have anything that has been handed down since then by way of Supreme Court interpretation. Certainly, as far as I am able to determine, most cases in the lower courts have applied the second amendment as being a prohibition against Congress in interfering with the maintenance of a State militia, which appeared to be the thrust of the language in the amendment.

Certainly the various States have considered a variety of statutes concerning the possession and use of weapons in connection with their police power which is reserved to the States. Typical examples of those are laws which, for instance, prohibit the carrying of concealed weapons or laws which impose additional penalties for crimes committed with the use of a gun. That kind of legislation is rather frequent.

The CHAIRMAN. Judge O'Connor, should the opinions of any one court of appeals be given any greater precedential value than those of the other Federal circuits? Would you prefer a continued emphasis on concentrating venue for certain subjects in one particular circuit, for example, administrative law questions in the Court of Appeals for the District of Columbia, or do you feel that diversity of thought would be beneficial?

Judge O'CONNOR. Mr. Chairman, I suppose in reality we give more credence to the opinions of those judges whom we respect and admire, and perhaps that is how we view them rather than giving more credence to the opinions from one particular circuit than another. I am sure that the court of appeals serving the District of Columbia inherently gets many more administrative law questions than other districts, by virtue of the fact that we have so many Federal administrative agencies located here, and that has resulted in a concentration.

However, generally speaking, I would think that the opinions of all the appellate circuits at the Federal level are entitled consideration and very weighty consideration.

INTERPRETATION OF THE CONSTITUTION BY STATE COURTS

The CHAIRMAN. Judge O'Connor, as a State court judge did you ever feel that the Federal judiciary considered its ability to interpret the Constitution to be superior to that of judges in State courts? Do you believe that State courts can be depended upon to interpret the Constitution as correctly as Federal courts?

Judge O'CONNOR. Mr. Chairman, that depends of course on the capacity of the individual State court but, speaking very broadly only, it seems to me that we do have in this Nation many very fine State courts and that we would do well to allow those State courts to function as indeed I think they are intended to function in considering a wide range of issues, including those of Federal constitutional principles as those cases arise. It is my belief that our State courts can serve us well in that regard, and I have confidence for the most part in their capacity to handle these very complex issues.

The CHAIRMAN. Thank you.

The distinguished Senator from Delaware, Senator Biden.

Senator BIDEN. Thank you very much.

To follow up on the question of the chairman about State courts, and the article you wrote in the William & Mary Law Review, Judge, isn't it true that historically the State courts have not done too well with regard to interpreting the Federal Constitution? The rationale for why the Supreme Court is better able to interpret the Constitution relates to the independence of that body, lifetime tenures, and the fact that many State courts are elected bodies and subject to political pressures. As for familiarity with the material, the fact of the matter is most State court judges do not regularly resolve constitutional questions, whereas the Federal judges do.

One of the things I would like to ask you is, do you truly believe that on balance the Federal judiciary is not more qualified than the State judiciary to interpret the Constitution of the United States of America?

Judge O'CONNOR. Senator Biden, we obviously in kur system have adopted the notion that we do need a Federal court system and we do need a U.S. Supreme Court to be the final determiner of these issues. I do not quarrel with that. I think it is a wonderful system but what I have tried to point out is that we have a dual system of courts in our country.

We have State court systems that also deal day-in and day-out with these constitutional issues. Indeed, the vast bulk of all criminal cases are tried in the State courts, not the Federal courts, and there is not a trial in a criminal case in a State court that does not raise certain Federal constitutional issues with which those courts have to deal. State courts are in fact dealing day-in and day-out with Federal constitutional issues and it is my belief that they are well-equipped to do this, and that we should not assume that because their manner of selection may differ or their length of tenure may differ, that they are less independent. I have seen some really remarkable examples of courage among State court judges in dealing with issues.

LIFE TENURE

Senator BIDEN. I do not dispute that but if that is true—I do not dispute that there are remarkable examples, but if that is true then the need for life tenure on the Supreme Court becomes much less significant. Some of my colleagues right here in the Senate suggest that there should not be life tenure. Some suggest that there should be mandatory retirement. I even heard it suggested there should be election.

Therefore, if in fact that is true, Judge, you are undercutting the argument that in fact life tenure is essential to the independence of the Supreme Court. There must, by definition, be some difference at least in degree.

I go back to the point again—I do not want to belabor this—but the reason the Federal courts got into this business in the first place is that the State courts did not—I emphasize, did not—interpret the Constitution in a way that the Federal courts felt proper.

They got into the business because citizens in the South and citizens in my State decided that they were going to keep some citizens in different positions than other citizens. They got into the business because they thought that they had to protect individual rights of citizens in certain States that the State courts obviously, on their face, refused to protect.

That is why they got into the business, and I just get sick and tired, quite frankly, of all this talk. Everything that has to do with the Federal branch of Government, whether it is the Federal courts or the Congress or anything Federal is bad, and States are good. I remind you and I remind my colleagues and I remind the audience that the reason the Federal Government got into 90 percent of the business it got into is that the State courts did not do the job.

I do not want to debate it with you. You are welcome to respond if you would like but I just think it is malarky to talk about how State courts historically are so competent and State court judges are equally competent on balance as Federal court judges. If that is the case, then we should change the Federal system and make it much easier.

Judge O'Connor. Mr. Chairman, Senator, I have not suggested that there is not a need for the Federal courts, and I am sure you recognize that. That has not been suggested.

Senator Biden. No; I am not saying that, but do you think there is a need for life tenure? Is there a need for life tenure for Supreme Court Justices?

Judge O'Connor. Life tenure, of course, is provided in the Constitution and to change that would require a constitutional amendment.

Senator Biden. I know that. Is there a need for that? Let me ask you a direct question: Do you think there is a need for that? I know it is in it. Do you think there is a need for it?

Judge O'Connor. Mr. Chairman, Senator Biden, it seems to me that judges can function independently under alternate systems of tenure.

Senator Biden. I agree.

Judge O'Connor. I do not believe that it is essential to the integrity or function of a given judge that that judge have life tenure.

Senator Biden. I see.

Judge O'Connor. That is quite a different question from saying, should we with the U.S. Supreme Court amend the Constitution so that we do not have it? I think it has served us perhaps reasonably well through the years, and those are different questions, but I do truly believe that it is possible for judges to function independently and well under alternate systems.

Senator **Biden**. I agree that that is the case. We have examples of it. I also agree that there are a number of public officials who are destined to be in the second edition of Profiles in Courage. I believe that there are brilliant women and men in every field, but I would suggest that the Founding Fathers were pretty smart. They perceived the vulnerabilities that exist in human nature and the exigencies of the times and what pressures they bring on people, and decided that it was not worth the chance to count on exceptional courage.

Let me go to one other point, to follow up on what Senator Specter said. Judge, I am going to vote for you. I think you will make a very good judge but I am a little disturbed about the reluctance to answer any questions. [Laughter.]

I am not being facetious. I mean that sincerely.

Let me read you from the *Brown* case. In the *Brown* case it says: "In approaching this problem"—the problem referred to is whether or not "separate but equal" is an appropriate doctrine—"we cannot turn back the clock to 1868 when the amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation of public schools deprives these plaintiffs of equal protection of the law."

I see nothing in the decision, there is no place in the decision where the Court said anything other than, straight up, "We are not reexamining the 14th amendment, we are not reconsidering it; we are saying that social changes, social policy, and social mores in America have changed to now make it reprehensible to allow any school board, any State, any jurisdiction, to say black folks cannot go to school with white folks for whatever the reason."

That was a fundamental change in the social mores of this country. The Court made no pretense about on what basis they were making it. They did not go back and say the 14th amendment was misinterpreted. They flat out said, "We are reflecting the change in social policy."

I know you know that, and I know it is difficult for you to respond to that because as soon as you respond to me you are going to have 14 other men jumping on you to say something else, so I will not even ask you to answer it, but I hope you know that I know you know. [Laughter.]

DISQUALIFICATION

However, I will ask you some specific questions that will not get you in trouble but have to be asked in my capacity as the ranking member. I guess these are the very dull questions that nevertheless should be on the record. They relate to the questions of recusal or disqualification. With all due respect, they relate to your distinguished husband.

Title 28, United States Code, section 455, requires disqualification of a judge when their spouse

> (1) has a financial interest in the subject matter in controversy or any other interest that could be substantially affected by the outcome of a proceeding, or

(2) is a party to a proceeding or an officer, director, or trustee of a party, is acting as a lawyer in a proceeding, is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Now your spouse is a distinguished partner in a law firm in Phoenix, Ariz., and by virtue of the community property laws of Arizona, you have an undivided one-half interest in that partnership, as we understand it. What standards will you use to determine when to disqualify yourself? Will you make an effort to determine what cases your spouse has worked on in the past? Will you keep yourself aware of the names of clients that your spouse has represented in the past? Will you determine when deciding an issue in the future whether your spouse has any connection with the parties in that case?

Judge O'CONNOR. Mr. Chairman, Senator Biden, yes. These are very serious matters and of great concern to anyone serving on the bench. It is a concern when the judge is married to an attorney that the judge be informed about the clients that the spouse is representing, and indeed the clients that the firm is representing, and to exercise great care in avoiding participating in any case in which it might be said that there was some relationship there.

Senator BIDEN. I have no doubt you will do that, Judge, but give us an idea mechanically of how you plan on being kept apprised of what cases your distinguished husband's law firm is involved in. I mean, mechanically how does that happen? I know that is clearly your intent; I have no doubt about your integrity but, mechanically, how do you do that?

Judge O'CONNOR. Well, at the Federal level as I understand it and in the Supreme Court, the parties are required, for instance, in the case of a corporation to reflect and list for the benefit of the Judges of the Court all of the subsidiaries and related companies involved, so that you do have an opportunity to know in fact what the links are with that party. Then it becomes necessary for you to determine whether that is on any list of clients that the office has, and of course they maintain such lists, so that is fairly easily done in a mechanical sense.

In addition, if the law firm in any capacity had been connected with the case, that would appear in the record someplace in the case below. I mean, they would have appeared as parties; they would show up on the pleadings. You know who has been representing them, so you have the further question, then—assuming that neither the spouse nor the law firm had any connection whatever with the case—if it related to a client, an occasional client or even a frequent client of the firm but in this instance the client was dealing with a matter that arose in another State and with another law firm. Then you have to determine whether that connection is such that a disqualification is necessary.

Senator BIDEN. I appreciate your taking the time to go into that. I think it is important that it be on the record, and for the public who are watching this hearing and for those who have a more cynical view of our system, our Congress, our courts, that there is a mechanism, that you are aware of the mechanism, that you have every intention of maintaining in a very scrupulous fashion adherence to that mechanism. That is why I bothered to ask the question.

My time is running out, but let me ask you one other question, if I may, about the appropriateness to be involved in promotion of social issues. Would it be, in your opinion, inappropriate for you as the first and only woman at this point on the Supreme Court—if you are confirmed, as I believe you will and should be—to for example be involved in national efforts to promote the ERA?

Judge O'Connor. Mr. Chairman, Senator Biden; I believe that it would be inappropriate.

Senator Biden. Why would it be inappropriate for you to do that while it is appropriate for Justice Burger to be traveling around the country telling us and everyone else what State and Federal jurisictions should do about prison construction and what attorneys should do about law schools and how they should be maintained, and whether or not we should have barristers and solicitors. I mean, what is the distinction? Is it a personal one or is there a real one?

Judge O'Connor. Mr. Chairman——

Senator Biden. I do not suggest he should not do that; I want to know what your distinction is. [Laughter.]

Judge O'Connor. It seems to me that it is appropriate for judges to be concerned and, indeed, to express themselves in matters relating to the administration of justice in the courts, and as to matters which would improve that administration of justice in some fashion. Certainly the court system is very heavily involved in the criminal justice system.

Senator Biden. However, doesn't he also speak not just about administration of justice? Hasn't he spoken—correct me if I am wrong—but hasn't he spoken about procedural changes in the law, not just for the administration of justice, in the broad sense of whether there are prisons or whether there are backlogs in the courts, but actually what should be the law relating to criminal matters and other matters? I mean, he has gone beyond and suggested legislation.

Judge O'Connor. Mr. Chairman, Senator Biden, yes, I think that the canons of judicial ethics do say that a judge may engage in activities to improve the law and the legal system and the administration of justice. I am sure that those statements which have been made are made in——

Senator Biden. I just do not want you to wall yourself off, Judge. You are a tremendous asset. You are a woman and the first one on the Court; don't let these folks, me included, run you out of being that. You are a woman; you do stand for something that this country needs very badly. We need spokespersons in positions of high authority. Don't lock yourself in, in this hearing or any other hearing, to do things that you are not proscribed from doing in the canons of ethics.

It is your right, if it were your desire, to go out and campaign very strongly for the ERA. It is your right to go out and make speeches across the country about inequality for women, if you believed it. Don't wall yourself off. Your male brethren have not done it. Don't you do it.

You are a singular asset, and you are looked at by many of us not merely because you are a bright, competent lawyer but also because you are a woman. That is something that should be advertised by you. You have an obligation, it seems to me, to women in this country to speak out on those issues that you are allowed to under the canons of ethics. Don't let us intimidate you into not doing it.

[Applause.]

The CHAIRMAN. I will warn the audience there will be no clapping, and the police will remove anyone who attempts it again.

Senator BIDEN. Will they remove the person who causes it, Mr. Chairman? [Laughter.]

I apologize. My time is up.

The CHAIRMAN. I wish to tell the police to remove anyone who attempts to express himself in such a manner, if it occurs again.

The distinguished Senator from Maryland, Senator Mathias.

TV IN THE SUPREME COURT

Senator MATHIAS. Thank you, Mr. Chairman.

These last few moments, Judge O'Connor, have been recorded on television and transmitted to the world. In fact, not only these last few moments but these last 2 days we have all been basking in the bright lights that are required for television.

I am wondering what your attitude is towards the introduction of television cameras into the courtroom of the Supreme Court. Justice Potter Stewart recently said that—

> Our courtroom is an open courtroom. The public and the press are there routinely. Since today TV is a part of the press, I have a hard time seeing why it should not be there too. As I understand the present technology, disruption is hardly a threat anymore, and I think it is difficult to make an argument to keep TV out when you allow everyone else in.

Of course, that is the conclusion that our chairman has made about this meeting, and I am wondering how you feel about TV in the Supreme Court.

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I would certainly want to wait until I had served on the Court, and discussed the situation with others and been privy to the concerns that others may have on the subject before I would formulate a position on it.

However, let me tell you that at least in Arizona we have been allowing cameras in the appellate courtrooms, television cameras, and I have participated as an appellate court judge in court with television cameras present. The experience has been reasonably satisfactory, I would say, as far as I am concerned. I have not yet participated in or did not participate in a trial in which television cameras were permitted in the courtroom.

It has been my thought that, as the technology improves and as it is possible to have that recorded without the necessity for the bright lights and with cameras which are not readily apparent, and without noise and interruptions, that it is conceivable to me that the technology will be such that we will conclude that it is less disruptive than perhaps originally might have been the case. Therefore, I would anticipate that we have not seen the last of the development in this area because, as you have correctly noted, television has become an important means of communication for people generally.

Senator MATHIAS. I think that is right. Through television, you have become known to millions of Americans. The disruptive aspect which might be complained about in a trial is unlikely to be a problem in the Supreme Court.

Let me move on now to another subject which is routinely considered by this committee when we have nominees for the courts or nominees for the Office of Attorney General before us, and that is the question of private clubs that discriminate on the basis of race, religion, sex, or national origin. Do you believe that it is appropriate for Federal judges to belong to organizations of this kind?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, the judicial conference has been considering this precise question, and in general has espoused the view that it is not desirable for Federal judges to belong to clubs which discriminate on the basis of race, sex, or national origin. It is suggested that in each instance that will be left to the individual conscience of the judge, at least that is the present status of it.

I do not disagree with it in general as it is applied to professional associations, certainly, or to clubs which discriminate on the basis of race. I, myself, belong to several women's clubs and they are service clubs, if you will, organizations that have devoted themselves to bettering the community. They do not discriminate on the basis of race or national origin but have no male members. I cite specifically the Soroptimist Club of Phoenix and the Charter 100, and the Junior League of Phoenix of which I am now a sustaining, not an active, member. It is not my feeling that those memberships should necessarily be dropped because of going on the Federal bench.

FIRST AMENDMENT

Senator MATHIAS. Let me turn to the first amendment. Chief Justice Burger has written that "a responsible press is an undoubtedly desirable goal but that press responsibility is not mandated by the Constitution and like many other virtues, it cannot be legislated." Would you feel in general harmony with those views of the Chief Justice?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I am not sure that I know the total thrust of that language or those comments. Would you care to expand and explain to me?

Senator MATHIAS. Well, I think generally it is whether or not you feel the first amendment is a comprehensive guarantee of freedom of expression; whether or not efforts to limit the first amendment in various ways, adopting the Chief Justice's words, to make the press more responsible, are in fact proper and constitutional.

Judge O'CONNOR. Mr. Chairman, the first amendment right of free speech, Senator Mathias, is a crucial right. It is a right which in this country has been recognized by the Court as having some precedence over many other rights that are also important. Cases examining statutory restrictions on the right of free speech have applied very strict standards, and appropriately so, very appropriately so.

The restrictions or exceptions have been rather limited in nature. They relate generally, as we know, to matters which are obscene; in the area of commercial speech to fraudulent speech or misleading speech; and in the case of other speech to speech which is basically to incite a riot or other criminal action. Beyond that, very few limitations have been upheld, and appropriately so, in my view.

Senator MATHIAS. Would you go as far, do you think, as the late Justice Black, who said that you had to take the first amendment right at face value: that when it said that "Congress shall make no law respecting the limitation of freedom of speech," that it meant just that?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I suppose not in the sense that I accept and recognize the exceptions that have already been placed, as I have mentioned.

BALANCE BETWEEN FREE PRESS AND FAIR TRIAL

Senator MATHIAS. What about the place where the first amendment collides with other guarantees, let's say, the guarantee of a fair trial or the right of privacy? Where would you make the balance between a free press and a fair trial?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, these are very difficult issues and, of course, the Court has been addressing them in connection with criminal trials. In the *Gannet* case, of course, the Court held that it is at least possible and that it would draw the balance in that case in favor of upholding the ability of a trial court, under appropriate circumstances, to close a pretrial hearing.

In a subsequent case, however, arising out of Virginia, the Court said that the trial itself will generally be open to the public and the press despite the defendant's wish to perhaps have it closed, except in certain circumstances which the Court did not define. It did not absolutely rule out the possibility that in a particular case that a defendant's right to fair trial would not take precedence, but it did not enlighten us as to the circumstances when that would occur.

I have found in my own experience that the conduct of the business of the courts is public business. On no occasion did I close the doors to my courtroom to the media. We conducted all of the business which I had, at least, in public. I felt that that worked well.

There are other things that a court can do to protect a defendant's rights in a given situation, such as sequestering the jury if that is necessary. It is also possible to change the venue of the trial if the media attention is so great that no fair trial can be obtained, so I think there are ways of dealing with the situation that give some flexibility to the court in an individual situation.

Senator MATHIAS. Therefore, you think—as I hear you answering—that the balance should be wherever possible in favor of the free press, the first amendment question?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, I do not want to be drawing any lines that are going to prove troublesome in connection with a given case, but I do feel that the conduct of trials in public is appropriate and that it is hard for me to visualize circumstances that would make it absolutely necessary to close the doors, although it is conceivable that there are such. There are other avenues open for a judge to employ.

Senator MATHIAS. Well, to go back to the question we discussed earlier of electronic coverage of a trial, suppose it would be determined in a given case that television coverage was going to be disruptive for some reason. Would you then consider that, let's say, radio coverage which does not require lights, does not require cameras, might be an appropriate way in which to provide for a full public access to the information that was available?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, that would not be offensive to me personally, had I been a trial court judge. I would want, of course, to comply with the canons of judicial ethics applicable in my State, and would be very concerned about doing that. As you know, not all States have made it possible for courts to be recorded either on the radio or by television; in fact, very few have.

DOCTRINE OF PRIOR RESTRAINT

Senator MATHIAS. Of course, here in the Senate we have on some occasions, notably the Panama Canal Treaty debate, used radio as an alternative for television as a means of informing the public of precisely what is happening here.

Now one recurring issue with respect to the first amendment is the applicability of the doctrine of prior restraint. We had a notable case recently, the *Progressive Magazine* case, in which they had published a diagram of how to build your own atom bomb. What are your views on the doctrine of prior restraint, and particularly when it is raised with a plea of national security?

Judge O'CONNOR. Mr. Chairman, Senator Mathias, again the balancing test is sometimes extremely difficult to employ. Under the first amendment, it would appear that the line will be drawn in favor of no prior restraint unless the Government bears and meets its extremely heavy burden to establish that indeed there is an actual danger affecting the national security which is very real and very present, before any prior restraint would be authorized.

It seems to me that that is an appropriate way to approach the issue. It is not an easy burden for the State—or the Federal Government in that case—to bear and, indeed, they usually lose but it should at least be possible for the Federal Goverment, it seems to me, to present an appropriate case that would truly affect national security.

Senator MATHIAS. Therefore, you would describe the burden not merely as heavy but as extremely heavy, before they can successfully argue for prior restraint.

Judge O'CONNOR. Well, Mr. Chairman, Senator Mathias, I would hope I would not be held to that in writing an opinion but it is somewhere in that range. It is a very great burden which the Government has in order to justify a prior restraint.

Senator MATHIAS. Personally, I would think the burden would be an extremely heavy one.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts, Mr. Kennedy.

Senator KENNEDY. Thank you very much. Thank you, Mr. Chairman.

To follow along on the issue which Senator Mathias has raised but to approach it in a somewhat different manner—and that is the claim of national security and how you balance the national security interest versus the first amendment—I think at the time when I was going to law school a number of years ago, the general rulings at that time were that whenever the Executive claimed national security, a very heavy deference was given to the Chief Executive or to the Office of the President.

We have seen and recent history has taught us the need to scrutinize the claims of the executive branch with great care before contemplating the inhibition on free speech, free association, free press, and the right of dissent. These cases which involved the Pentagon papers, the Elsberg break-in, I think reflect that as really a different view or a different role by the Court in reviewing the claims of national security.

I was interested in hearing your own attitude, how you as an individual view the role: whether you view the role as an umpire in our Federal system, weighing the competing first amendment and national security claims. Are you going to give the complete, basic, and overwhelming presumption to those who make the claim? Are you going to examine in some detail the background for such claim? How will you approach this general issue?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I think I would not approach it by the application of presumptions but, rather, that it would be appropriate to know the basis upon which the claim is made as fully as possible.

Senator KENNEDY. Therefore, as I understand your answer, rather than just deferring to those that claim it, you would assume an active role in examining the underlying assumptions for such a claim.

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, yes, it would seem to me to be the appropriate role of the Court.

Senator KENNEDY. In another area that was raised by some of our colleagues on the issue of crime and law enforcement, and your responses to another Senator's inquiry about the doctrine of stare decisis, I wonder as you view the development of criminal law rulings that have been made over the last 20 years, whether you will follow the doctrine of stare decisis for the holdings of the Supreme Court in some of these important areas of preserving the individual rights of the defendant.

Will you follow that doctrine of stare decisis as closely as you may in some of the other areas? Whatever our definition of judicial activism will be, or how it has been established over the course of these hearings, is it your basic feeling that you will follow those criminal law holdings of the Court in the past as precisely as you might in other areas of policy?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I would expect to apply my view of the rule of precedent evenhandedly, without respect to the area of the law to which we are referring.

MIRANDA RULE

Senator KENNEDY. As a judge, and in your experience as a judge, how much impact has the exclusionary rule and the *Miranda* rule on confessions actually had on prosecutions that you have dealt with?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, I want to distinguish the two because I had different experiences concerning them.

Senator KENNEDY. Well, I would be interested in both.

Judge O'CONNOR. I had many criminal felony trials on the trial court bench, many. That is all I did, all day long, for 2 years, and had others throughout the remainder of my time on the bench.

The *Miranda* rule was one which frankly those in Arizona did not greet with a lot of enthusiasm. It came from Arizona; it was an Arizona case and, of course, those in Arizona thought they had done the right thing, so it required a period of adjustment.

It requires the recitation of some rights which frankly can become rather mechanical in its recitation, and as applied to those criminals who have had extensive experience with the law, I think some of those defendants could recite the rights more easily than the peace officers assigned to do the task. However, for some it has had meaning, for some who are not experienced in the criminal law, being advised of their rights has had a substantive effect and a meaning.

My experience on a trial court is that the application of *Miranda* has not resulted in an inability of the police to still be reasonably successful in their efforts to gain information and obtain statements. It has, no doubt, precluded some but on a broad, general basis I cannot say that I think the police have been unable to cope with it.

We have had to have *Miranda* hearings in advance of every trial to determine to what extent these statements must be excluded, and it was seldom that we had to exclude the statements. People continued to make statements despite the fact that they had been warned of the consequences, in large measure. Therefore, I cannot say that I think the application of *Miranda* has simply tied the hands to the extent that police work is ineffective.

EXCLUSIONARY RULE

Senator KENNEDY. How about in the exclusionary rule? How many times did that come up, say, in the time of your 2 years?

Judge O'CONNOR. Many, many times. Almost always in a drug case.

Senator KENNEDY. I see. How many times did that really affect the outcome, either in an acquittal or a reversal?

Judge O'CONNOR. A number of times. I think the exclusionary rule, from my simple observation as a trial court judge, has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police.

I am not suggesting, and do not want to be interpreted as suggesting that I think it is inappropriate where force or trickery or some other reprehensible conduct has been used but I have seen examples of the application of the rule which I thought were unfortunate, on the trial court.

Senator KENNEDY. Do you think that either rule has had much of an impact on the rate of crime, for example, in Arizona?

Judge O'CONNOR. That is a very speculative sort of a thing for me to respond to. I would not think that the *Miranda* rule has actually affected the crime rate. Conceivably, the exclusionary rule has had some effect in some areas of the crime rate, possibly in the drug enforcement.

Senator KENNEDY. In an entirely different area, the Court has had increasing involvement in complex claims involving Native Americans, redress, broken treaties, and these have involved large tracts of lands and large sums sought for compensation. Your record shows an awareness of a special obligation to Native Americans. Could you give us some idea, in general, as a westerner, how you would approach these issues in order to try and deal with a sense of justice and equity to the Native Americans and still balance the legitimate claims of others, without unduly disrupting the lives and the economy of the rest of a State's citizens who are perhaps completely innocent bystanders?

Judge O'CONNOR. Mr. Chairman, Senator Kennedy, Arizona is fortunate in having approximately 14 Indian tribes and a great deal of reservation land in the State. I think it adds to the cultural diversity of Arizona and the interests that we enjoy.

It also has given rise to some litigation, as you have mentioned, in a variety of contexts and it has given rise to some disputes on the legislative level concerning the appropriate boundaries for representative bodies. As you know, on the reservation Indians are not subject to State taxation, and I would say that much of the litigation which I have seen arises out of the framework of the taxabilitiy of certain transactions which occur on the reservation, transactions involving non-Indians and Indians, or non-Indians but on the reservation, and so forth.

These matters have developed over the years a body of law dealing particularly with these relations, and the Indian tribes enjoy certainly a special status and special exemptions in the area of taxation and other State regulation.

Senator KENNEDY. I was thinking not only of taxation but water rights. Even in my part of the country, because of the failure of the Congress to pass enabling legislation, there still are some very serious questions about land distribution and the real title to various land.

I was just interested in your own concern about the fairness and equity to Native Americans, and how you balance some very solemn obligation responsibilities that we have with the rapid development in some parts of the country among agricultural interests and other types of interests. How you are going to approach these matters. Clearly you have had a strong interest in these issues in the past. I think for many Native Americans they would be interested in the concern that you will bring to the Court about their interests.

Judge O'CONNOR. Well, Mr. Chairman, Senator Kennedy, I view with interest and concern the problems of the Native Americans, as I do every other discreet group which has suffered from disadvantages. I would approach each particular case involving a question of taxation or water rights or land ownership as I would any other case for any other citizen, I would hope, very evenhandedly. I would try to deal with it in as fair a manner as I know how. I am aware of the background and the heritage and the problems, and I would try to resolve the cases on the basis of the facts of the case and the law applicable to that particular situation.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah, Mr. Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have to apologize to you because I have to conduct my own committee this afternoon, so I will not be able to sit in and listen to your responses, but I have satisfied myself from our almost an hour discussion and other discussions subsequent to that, that you are an excellent choice for the U.S. Supreme Court and a long overdue one at that.

However, I do have some questions I think are important to put on the record, and I would like to just take a few minutes of your time and ask them here today.

In a number of decisions over the years, the Court has held that the 14th and 15th amendments require proof of intent or purpose prior to a finding of a constitutional violation. Given that this is the standard, and given that Congress chooses to use either of these amendments as the basis for a statutory measure, would you believe that the Congress might constitutionally adopt some lesser standard for identifying violations?

I might add, putting policy aside, do you believe that the Congress would have to have constitutional authority to do this?

AFFIRMATIVE ACTION

Judge O'CONNOR. Senator Hatch, I am not sure I quite understand yet the thrust of the question. Now this is in connection with affirmative action?

Senator HATCH. Yes; it would be affirmative action, and let's use that as a perfect illustration. I will give you an illustration: In recent years, some in the civil rights community and in the Justice Department have developed a test for determining the existence of discrimination that looks to the effects or disparate impact of an otherwise neutral action, rather than to whether there is some discriminatory intent or purpose or motivation, in other words, some wrongful state of mind.

Now considering that, and considering that the Court has held in a number of cases that the standard of proof generally requires some degree of intent or purpose, even circumstantially, do you believe that Congress could adopt a lesser standard than some proof of intent in these cases, and do you think that the Congress might constitutionally adopt some lesser standard in order to resolve some of these problems or identify violations?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, this whole area of affirmative action is one that has given rise, of course, to some fairly recent litigation touching upon both congressional enactments and State statutory enactments and policies.

In general, it appears to me that what the Supreme Court has done is to say that the enforcement clauses of the 14th and the 15th amendments, giving Congress the power to enforce those amendments by appropriate legislation, has been to acknowledge a power of Congress that goes beyond, if you will, the direct application of those amendments on their face.

In other words, if the 14th amendment or the 15th amendment on its face would have been held by the Court, as it has been, to require proof of discriminatory purpose, or intent, on the other hand the Court has said that Congress can apparently go beyond that in its enactments, to a degree.

I think the area of the law is still undeveloped in some respects but we are seeing several examples, at least, in court decisions that have been handed down where the power of Congress under the enforcement sections has extended beyond the bare applicability of the statutes. I would assume that Congress in its wisdom would be considering, as I know you are, the appropriate statutory resolution of these matters. I am sure that we will continue to see additional litigation.

DISCRIMINATORY INTENT

Senator HATCH. Let me put it another way: There seems to be a fundamental distinction between men and women of good will on the issue of identifying what constitutes "discrimination." To some, the act of discrimination requires some mental element, some demonstration of a mind purpose, or a motive. To others, statistical imbalance is enough to show racial or ethnic discrimination without any proof of intent whatsoever, even by circumstantial evidence or otherwise.

Do you have any views on this matter personally? In other words, can you brand somebody a discriminator or as racially motivated or a racist without some element of intent, whether it is circumstantial or otherwise?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, again without intending to represent that this is a legal decision on any of these very complicated matters that would come before the Court, my general personal approach would be to look for discriminatory intent, evidence of that.

Senator HATCH. Thank you.

Yesterday Senator Metzenbaum asked you a series of questions about 42 United States Code 1983, which is a very volatile subject today in American jurisprudence. His questions, it seemed to me, may have left a lingering impression that I would really like to see resolved.

He maintained that Federal rights such as those arising in social security cases and the like should be accorded a right of access to the Federal courts. Now is there any particular type of claim or particular class of cases that give a claimant a right to have his claim adjudicated in the Federal courts?

Maybe I could clarify that even a little bit more. In the *McCurry* case of this year, the Court reversed a court of appeals holding that appeared "to be a generally framed principle that every person asserting a Federal right is entitled to one unencumbered opportunity to litigate that right in the Federal district court, regardless of the legal posture in which the Federal claim arises, but" the Court continues "the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee but leaves the scope of the jurisdiction of the Federal district courts to the wisdom of the Congress."

The Court then proceeded to reject every other "conceivable basis for finding a universal right to litigate a Federal claim in a Federal district court."

Now does this Supreme Court language seem to support your reading that the State courts are worthy of more credence in these type of cases?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I do not know whether that is what the Court had in mind when it wrote those words, but we have discussed I guess at length in these hearings my belief that indeed State courts can provide a hospitable forum for the hearing of Federal rights.

Certainly the Supreme Court in the recent session handed down several decisions in this whole area of examining Federal statutes to determine when those statutes created a cause of action for someone and when they did not. It appears to me to be an area in which the Court, at least more recently is looking more closely at the congressional legislation to determine if indeed there is such a right.

This is an area, I might add, in which I think the Congress has a very important role as well as the courts, Congress in its role to make clear whether it intends to be creating some cause of action, and if so, what.

Senator HATCH. Yesterday, in response po one of Senator Thurmond's questions, you noted that you supported a bill in the Arizona Senate, 1165, I believe, which disallowed funding for abortions unless medically necessary, but later you told Senator Dole that this bill bascially reflects your views today, or at least that is the way I understood it. How did you understand the meaning of "medically necessary" in 1974, and can you draw a distinction, either in your past role as a State legislator or in your current role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, my recollection is that that is not exactly the language of the bill, and I will refer to it.

Senator HATCH. I am not sure myself.

Judge O'CONNOR. It contained a provision that no benefits would be provided for abortions except when deemed medically necessary to save the life of the mother——

Senator HATCH. I see.

Judge O'CONNOR [continuing]. Or where pregnancy resulted from rape, incest, or criminal action. That was the language of the bill.

Senator HATCH. Therefore, you would limit it to that language.

Judge O'CONNOR. That was the provision to which I referred, which was adopted and passed. The other portion of your question was——

Senator HATCH. The other portion was, can you draw a distinction either in your past role as a State legislator or in your present role as a judicial nominee, between Federal rights and Federal funding to further rights?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, yes, I think that the establishment or recognition, if you will, of a particular constitutional right has been held by the Court not to carry with it a right to funding for the exercise of that right, if that is what you mean, and I believe that has been reasonably established.

Senator HATCH. I think that helps.

Several recent Supreme Court decisions have sharply—I will go back to that *Thibidoe* decision that I brought up prior because I think it is an important issue of today—several recent Supreme Court decisions have sharply expanded the liability of municipalities under section 1983. The *Thibidoe* case, for an example, extended th scope of 1983 to include violations of any Federal law instead of just civil rights law. The *Owens* case eliminated even the good faith defense for municipalities.

Now what distinctions would you make to prevent further expansion of 1983, or really can it be expanded any further?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I am not sure that I know that it can. Since the *Thibidoe* case the Supreme Court has handed down several additional cases to which you have referred this morning which have in fact not found a cause of action being created in those specific contexts of the legislation, so I think *Thibidoe* has been modified to a degree by subsequent cases.

Senator HATCH. It has been expanded, in many ways.

Judge O'CONNOR. It has been expanded in other areas. Certainly the municipalities have no good faith defense, athough I think the other public officials and employees are still granted the good faith defense.

Another recent case has held that no punitive damages are allowable.

Senator HATCH. Of course, you cannot convince the municipalities of that because there are multibillions of dollars of actionable claims against municipalities all over this country today, as a result of *Thibidoe*, both the *Thibidoe* and the *Owens* cases.

Judge O'CONNOR. Mr. Chairman, Senator Hatch, I think it is a matter of concern and I think it is a matter of concern not only within the context of individual cases to come before the Court but to the Congress itself as it reviews these provisions.

ATTORNEYS FEES

Senator HATCH. In your article in the William & Mary Law Review, you indicate that the attorneys fees statute, section 1988, might profitably be modified to reduce the number of section 1983 suits and to reduce the burden on State and local governments. Now since we are discussing that in our committee now—on the Subcommittee on the Constitution, which I chair—do you have any specific recommendations for amending section 1988 with regard to attorneys fees?

Judge O'CONNOR. Mr. Chairman, Senator Hatch, nothing specific other than to suggest that categories of types of actions perhaps could be considered and weighed with regard to it. To preclude appropriate causes of action or to discourage appropriate causes of action by removing the capacity to collect attorneys fees would no doubt be unwise, but to discourage causes of action that are specious, or in areas in which the Congress never intended, if you will, that the section be applicable would present another matter for consideration.

Senator HATCH. Judge, I would just like to say in closing that I have certainly enjoyed listening to you. I think this is a very difficult position to be in, with all these lights and all these people and all these questions and all these Senators, but I think you have acquitted yourself really well.

I personally am very proud of you, and I am going to support you, as I indicated quite a while ago, and be very proud to have you on the Supreme Court of the United States of America. I am very pleased with having you here during these hearings, and having you have this opportunity.

Judge O'CONNOR. Thank you.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. The committee will now stand in recess until 2:30.

[Whereupon at 12:55 p.m. the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The Judiciary Committee will come to order. Questioning of Judge O'Connor by the members of the committee will continue.

Judge O'Connor, I would remind you that you are still under oath.

Judge O'CONNOR. Thank you, Mr. Chairman.

The CHAIRMAN. We will now hear from Senator Laxalt of Nevada.

PRESIDENTIAL AUTHORITY OVER INDEPENDENT AGENCIES

Senator LAXALT. Judge O'Connor, in 1972 legislation which was sponsored by you was enacted by the Arizona Legislature giving the State attorney general power to approve all regulations proposed by State agencies.

Here at the Federal level the experts have debated what inherent authority the President has over Federal agencies, including the so-called independent agencies, due to his constitutional role as Chief Executive.

We are in the throes now of attempting to enact and implement administratively as well as up here legislatively substantial regulatory reform. The essence of that problem is jurisdictional in part.

I would like to have your views as to what Executive authority over the so-called independent administrative agencies you believe a President of the United States has.

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, I think it may depend on the legislation in each instance as to what role has been envisioned for the Executive with respect to some particular agency.

I recognize that Congress is dealing today in terms of legislative review of the relationship that would be appropriate in terms of agency regulation.

In fact, I think some consideration is being given—if I am not mistaken—to even having the legislative body itself involved by some sort of legislative review.

These proposals, of course, have not been tested yet; and I cannot speak to the constitutional validity of them, I think; but it involves essentially a question of the essential separation of powers concept and the extent to which, under the separation of powers at the Federal level, it is considered desirable to have some form of oversight of the administrative bodies, whether it be by the executive branch or the legislative branch.

To the extent that these administrative agencies are executive agencies or agencies under the executive branch of Government and that the executive branch is given some role of oversight in connection with them, it does not appear to involve a question of separation of powers.

To the extent that the concept or vehicle used is one of legislative review of the regulations or the actions, we have different questions at play.

In Arizona, as you have indicated, the State adopted a practice in the year that you mentioned of having the attorney general part of the executive branch review the regulations of agencies of the executive branch for legality prior to their adoption by those agencies. That system seems to have served reasonably well.

Senator LAXALT. If I understand you correctly, in the absence of some legislative prohibition there would be no constitutional bar on the grounds of separation of powers or otherwise, restraining a President from exercising direct authority and responsibility over the independent agencies if the legislation in question opened the door for him to do so?

Judge O'CONNOR. Mr. Chairman, Senator Laxalt, it would appear to me—again without attempting to express any legal opinion on a given case—that within the executive branch, provided the legislation allowed for it, the executive branch could be assigned certain roles for review of those executive branch agencies.

Senator LAXALT. As you indicated, a combination of proper oversight here of those agencies plus general supervision on the part of the Executive theoretically at least should get the job done?

Judge O'CONNOR. Senator Laxalt, we would hope so.

VENUE RULES

Senator LAXALT. Let us talk about venue for a moment. I do not know whether or not you have followed the progress of rather substantial venue legislation we are pursuing through this committee.

Under section 1391 of title 28 of the United States Code actions in which the Government is a party may be brought in one of four places—I am sure you are already familiar with this—No. 1, where the plaintiff resides; two, where the defendant resides; three, where the cause of action arose; or, four, where any real property involved in the action is located.

As you probably already know from your previous experience in a Western State, many cases involving Federal land located in Western States are brought here in Washington, D.C. As a result, there is little opportunity for individuals vitally interested in the outcome to participate in such a proceedings effectively.

We have had land decisions decided here; we have had water decisions affecting our water decided here by district judges within the District of Columbia.

In addition, there is some feeling that the Federal judges in those Western States have a better understanding of the practical consequences of these lawsuits over land use.

Considering that the Federal Government owns or controls approximately 50 percent of the land in the Western States—and in your State and mine substantially more than that; ours is 87; I do not know exactly what yours is, but I think it is near that—people in those States increasingly feel that they have no say about significant matters that affect them on a daily basis.

Now, Judge O'Connor, do you consider a change in the venue rules which requires suits to be brought in the district where the outcome of the suit will have the greatest impact an appropriate action by this Congress?

Judge O'CONNOR. Senator Laxalt, it appears to me that that determination is one that is peculiarly appropriate, I suppose, to the legislative branch to determine.

If there were no other impediments involved normally we would want to consider in terms of where a cause of action is brought some of the factors affecting the convenience of the parties. In other words, if most of the parties find that it would be more convenient to have the trial brought in a particular location rather than another, that is a factor that normally one would want to consider.

As far as any statutory changes are concerned concerning the provisions for venue, that seems to me to be a policy question appropriate for the legislative branch to address certainly.

Senator LAXALT. Do you see that this poses any degree of constitutional question?

Judge O'CONNOR. Senator Laxalt, I do not know offhand whether any particular constitutional issue could be raised concerning it. I really have not studied that problem and would want to have the benefit of some research before I could answer that. None comes immediately to mind, but I have not researched the question.

JUDICIAL NOTICE

Senator LAXALT. I understand.

Let us talk about judicial notice for just a moment or so. Reviewing your own record, it has been very pleasant for this Senator as a former lawyer and one who has worked on this committee for quite a while to find that you have, in fact, as a judge, exercised considerable judicial restraint. You, in fact, in your position, have been a judge rather than a public official or a legislator; and you have operated within those constraints.

One of the areas where license can be used, I would imagine, by any judge, is in looking beyond the record factually as a judge may or may not find that record and getting out into the labyrinth that we call judicial notice. This brings into play then, factually and otherwise, an independent situation which may or may not be proper.

In this general area I would like to ask you this, Judge O'Connor: In the context of several of your own opinions you have been called upon to address the permissible scope of judicial notice. As a matter of policy rather than one of statutory construction, what do you, as a judge who has sat on the State level and who now aspires to sit on our highest court, view as the proper range of judicial notice?

I suspect that in controversial cases that have been alluded to here previously *Roe* v. *Wade* and others—perhaps our Supreme Court in that situation did, I think, indulge in far too much latitude in this area. May I have your views?

Judge O'CONNOR. Senator Laxalt, with respect to the application of those things of which a court can take judicial notice I can share with you my views as a State court judge when I have had to face the question, and that basically is that the court was allowed to take judicial notice only of matters which were, in effect, beyond dispute—for example, a date or the time within which the Sun rose or set on a given date, or the location of a particular community geographically, or something of that sort.

These are the instances in which we would normally apply judicial notice at the State level—I would say very limited circumstances.

Senator LAXALT. Do you see an application of the doctrine in respect to the functions of the Supreme Court?

Judge O'CONNOR. Senator Laxalt, I have not had occasion to review all the instances in which the Supreme Court has been called upon to take judicial notice of something, so I would be perhaps not in a position to give you examples of where the Court may have adopted a broader view if it has. I can only speak from my experience as a State court judge in which the application of the doctrine would be very limited.

REGULATORY STATUTES MAY VIOLATE CONSTITUTIONAL DOCTRINE

Senator LAXALT. Judge O'Connor, as chairman of the Regulatory Reform Subcommittee within the framework of this general committee I am becoming increasingly involved with issues of lawmaking by administrative agencies.

Senator Heflin alluded to this during the course of his questioning but did not have an opportunity to pursue it further, so I would like to if I may.

Many have criticized the Congress for giving this power to agencies too broadly without sufficient guidelines, essentially abdicating congressional responsibility to legislate to the agencies.

That has been part of our problem here. We have passed legislation for many years in general form and, I think as a political matter, passed the buck downtown and let them do the dirty work by fleshing it out with rules and regulations on the part of many agencies, none of whom in terms of personnel are responsive to the process—unelected people.

Some eminent legal figures have concluded—I guess eminent legal figures are ordinarily those who agree with you—that certain of these statutes violate constitutional doctrine that Congress may not delegate its lawmaking power without clear and adequate guidelines.

Now, Judge O'Connor, do you believe that some existing regulatory statutes may be unconstitutional because of the failure of Congress to adequately lay down the general policies and standards that animate those statutes?

Judge O'CONNOR. Senator Laxalt, it seems to me that there was a time in our Nation's history when the Supreme Court used to look under the separation of powers doctrine at the delegation of legislative power to the executive and administrative agencies and review very strictly those delegations. Those were the days of *Schlecter Poultry* v. *United States* back in the 1930's.

Such an uproar arose at that time that ultimately the Court reversed that trend and began to approve very sweeping delegations of power to administrative agencies and has upheld agency regulations which had really a very tenuous basis of support in the legislation itself.

One can recall for example the *Red Lion Broadcasting* case where, under very limited delegation by Congress, very sweeping regulations were upheld.

My observation is that in recent years there are some indications at least that the Court is examining the legislative basis for agency regulations more carefully than had been the case for a while.

A very recent case dealt with whether an agency had to make a cost-benefit analysis of its regulations, and I believe the Court indicated that because that was not reflected as a duty in the legislation therefore none would be implied.

Certainly it would appear to me that the legislative branch has a very important role to play in this area in terms of determining for itself the extent to which it wants to be specific in its delegation and limitation of power to the Administrative agency to adopt regulations.

Just as a personal view expressed by one who has been in the legislative branch, it seemed to me then that very careful guidelines were appropriate to be drawn by the legislative branch in permitting agencies to adopt rules and regulations. Certainly the legislative branch has a terribly important role in this.

The Court's role then becomes one of examining the legislation to determine whether, in fact, the administrative agency is authorized to adopt the types of regulations that it has. In that regard I can only indicate to you what I may see as a trend of more careful study of that matter by the courts.

Senator LAXALT. I thank you very much, Judge.

Mr. Chairman, that concludes my time and my questioning. I thank the chairman. I thank the judge.

The CHAIRMAN. The distinguished Senator from Ohio, Senator Metzenbaum.

CONCERNS OF THE POOR

Senator **Metzenbaum**. Judge O'Connor, your testimony yesterday led us down some paths about which I would like to make a few comments.

Your thoughts for limiting attorney's fees in section 1983 cases and keeping the $10,000 jurisdictional prerequisite for other Federal question cases, in my opinion, actually strike at the heart of Federal jurisdiction.

I think that what disturbs me particularly is that apart from whether the Federal courts should have this jurisdiction in general, the attorney's fee and $10,000 limitations actually strike only one group of litigants, and that is the poor. That is one reason Congress created the right to attorney's fees in section 1983 cases just a few years ago, in 1976.

Since this is a matter that seems to me to be so relevant, since I am concerned that if there is any group of people in this country at the moment who are the forgotten people of the country and who are going to be even more forgotten in the months and years ahead, I am disturbed about that kind of expression or that direction.

I wonder if you would care to comment, because in your past legislative history, in all fairness, I see nothing to indicate that you have been indifferent to the concerns of the poor.

Judge **O'Connor**. Senator Metzenbaum, indeed I am not indifferent to the concerns of the poor.

The legislation in section 1988, as I read it, is certainly not limited to the award of attorney's fees to people who are impoverished. Indeed, I suppose a very wealthy individual can file a suit under section 1983 and seek attorney's fees under section 1988. So I do not believe that the legislation, as drafted at least, is in any way limited to a protection of the poor.

No doubt a portion of the motivation for its enactment was to enable suits to be brought by anyone regardless of their means to do so.

Senator **Metzenbaum**. But the attorney's fee question hurts them the most because those who are the "haves" can hire their own lawyers. It is the "have nots" who really have the difficulty of finding counsel, and counsel taking it then on an "if come" basis could get awarded attorney's fees under the law. Your article suggests a contrary point of view.

Judge **O'Connor**. Senator Metzenbaum, my article suggested that Congress should review very carefully its delegations of authority to sue in the first instance and also a review of those matters in which it thinks attorney's fees provisions are appropriate.

The article in no way suggested that that was a function of the judiciary, and I am sure that Congress in its wisdom will consider all of these factors as it makes this type of review.

I have not suggested, I think, that people who are impoverished be denied access to the courts. In fact, that would be a most unfortunate suggestion and one which I would not make.

But the extent to which Congress wants to authorize suits in the first instance in the Federal courts as opposed to the State court and the extent to which Congress wants to authorize suits and have attorney's fees a possibility are appropriate things, it seems to me, for the Congress itself to consider as a matter of policy.

MORE LITIGATION IN STATE COURTS

Senator **METZENBAUM**. You mention the matter of the State courts. Actually you also suggest that more litigation ought to be in the State courts rather than just full access to the Federal courts.

But actually State courts really have had more experience in the constitutional issues where criminal matters were involved, and much less experience with respect to civil constitutional claims, which are the subject of all section 1983 civil rights cases and other Federal question cases. You would agree with that, would you not?

Judge **O'CONNOR**. Yes; I would agree generally that the expertise of the State courts in the constitutional area, while not exclusively confined to criminal cases, has been primarily in terms of numbers in that area.

I think that the State courts have developed a pretty good capacity to deal with those questions, and I see no reason why that capacity could not be extended to other areas as well.

Senator **METZENBAUM**. In view of your desire to shift Federal question and section 1983 cases to the State courts and to rely on the State legislatures as indicated by your response to the Judiciary Committee questionnaire, would you disagree with this statement by Justice Stewart speaking for a unanimous Court in *Mitchum* v. *Foster* in 1972 that, "the very purpose of section 1983 was to interpose the Federal courts between the States and the people as guardians of the people's Federal rights to protect the people from unconstitutional actions under color of State law whether that action be executive, legislative, or judicial"?

Obviously, he is saying that we need to have that Federal right and the right to go into the Federal court because in many instances the denial of rights occurred not alone at the executive level, not alone at the legislative level, but also at the judicial level.

If you force those cases back into the judicial level, then how does the litigant get a chance to protect his or her civil rights?

Judge **O'CONNOR**. Senator Metzenbaum, I do not disagree at all with the statement that you read. The framework of review could of course encompass making an initial presentation of one's case at the State level in any given situation, and if it were believed that a Federal right had been violated and that it was not adequately vindicated at the State level then to pursue the remedy further through the Federal courts. That certainly is a possibility, it strikes me.

Senator **METZENBAUM**. I am not sure I follow that. If you cannot get your rights litigated and the court has ruled against you in the State court, are you suggesting that you could relitigate the issue in the Federal courts?

Judge **O'CONNOR**. I am suggesting, Senator Metzenbaum, that to the extent that one is in a Federal court and believes that the result on an issue of Federal law was erroneously received or determined one can raise that issue then in the Federal court.

Senator METZENBAUM. Do you not think res judicata would prevail to cause the Federal court to dispose of that matter rather summarily on the basis that the case had been decided and the constitutional issue had been raised in State court?

Judge O'CONNOR. Senator Metzenbaum, not if you are appealing from that very matter of course res judicata is not attached. If you are pursuing your remedy in Federal court, and you feel an error has been made, and you then go to the Federal court for review, no, you are not precluded from doing that.

If on the other hand you had litigated your case, and dropped it, and had taken no appeal or petition for review in the Federal system, and then tried to pursue it again, yes, then you would have a res judicata problem.

Senator METZENBAUM. If you had litigated the issue in the State court, and the State has ruled that you had no Federal right or constitutional right, and you do not appeal, and then you file suit anew in the Federal court, is it not entirely probable or logical that defense counsel would immediately file a motion to dismiss on the basis of res judicata?

Judge O'CONNOR. Yes, Senator Metzenbaum, if you do not pursue your immediately available remedies within the Federal system and let it be terminated at the State level. Yes, of course, you are thereafter precluded.

Senator METZENBAUM. What would be the immediately available remedy in that instance? You have lost in the State court; now what is your immediately available Federal remedy?

Judge O'CONNOR. You can file your petition for certiorari of course if it has been determined adversely on the Bederal issue. If you have gone to the highest State court you can certainly do that.

Senator METZENBAUM. Now you have to take your case all the way up through the appellate procedure and then file your petition for certiorari with the Supreme Court. That really is not really a very practical remedy for the average litigant because by that time he or she has pretty well run out of money, particularly if they are not well-heeled. That would mean you were in the fourth court: You had been in the lower court, the appellate court, and the supreme court of the State, and then you take the case on certiorari. Then you have to make out that Federal issue that is involved.

I just wonder whether realistically speaking, by moving more of the civil cases through the State courts and forcing litigants there and also denying them their attorney's fees, a great injustice would not be done to hundreds of thousands and maybe millions of Americans who might otherwise want to litigate a Federal question.

Judge O'CONNOR. Senator Metzenbaum, these are the precise things that I would assume this body would consider when it considers that issue. Of course you want to review all these matters very carefully. I am sure that the Senate in its wisdom will do precisely that.

JUDICIAL ACTIVISM

Senator METZENBAUM. All right. Let me change the subject. In your response to the committee's questionnaire and your other answers here you have made it very clear that you are opposed to "judicial activism."

Exactly what is and is not judicial activism is not that easy to define. It is very easy to say that the Supreme Court or the court should not make laws.

I would like to ask some questions about some of the major issues in some cases that have already been decided by the Supreme Court. Most of them are quite old and probably will never again come before the Supreme Court.

The *Baker* v. *Carr* case—this 1962 decision allowing the Federal courts to require local legislative bodies to be fairly apportioned—probably did more to reshape our political system than almost any other decision of the Supreme Court. It largely ended the gross malapportionment that existed in many States.

In your opinion was that decision an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, you are correct in your characterization of the dramatic results of that decision and its progeny. I think what the Court really did in *Baker* v. *Carr* was to reexamine the question of what is a political question which the Supreme Court will or will not consider.

I think before *Baker* v. *Carr* the Court had taken a more restrictive view, if you will, of what is of justiciability—of what is a political question—and in what case will the Court avoid deciding it at all because it is a political question.

In *Baker* v. *Carr* it really drew more liberal lines, if you will, in determining what is a political question which the Court will consider. That now appears to be the leading case on the subject of what is or is not a political question.

Senator METZENBAUM. And that is the case that established the one man, one vote rule.

Judge O'CONNOR. That is correct.

Senator METZENBAUM. Was that an inappropriate exercise of judicial activism?

Judge O'CONNOR. Senator Metzenbaum, I may have been heard to comment at the time that it concerned me but—that perhaps it was. Certainly the time that has intervened in the meantime and the acceptance of that decision has put it pretty much in place in terms of its present effect and application.

SEX DISCRIMINATION

Senator METZENBAUM. Do you think there was inappropriate judicial activism in 1971 for the Burger Court to rule for the first time in *Reed* v. *Reed* that sex discrimination was unconstitutional?

Judge O'CONNOR. Senator Metzenbaum, it was in my view an appropriate consideration of the problem of gender-based discrimination.

CRUEL AND UNUSUAL PUNISHMENT

Senator METZENBAUM. Do you think it inappropriate judicial activism for a Federal district court to order major changes in a prison after finding that conditions in a penal system constituted cruel and unusual punishment? That was in the case of *Hutto* v. *Finney*, which reached the Supreme Court in 1978.

Judge O'CONNOR. Senator Metzenbaum, I think the constitutional provision against cruel and unusual punishment has been of course part of our Constitution for many years; and it is certainly not inappropriate for the Court to consider a case that alleges that a particular prison condition constitutes cruel and unusual punishment. I do not view that as any unusual exercise of judicial activism.

You can examine then the particular remedies that are selected by the Federal district court, assuminx it finds such a condition, and then begin to discuss the extent to which the district court remedies exceed what is regarded as an appropriate exercise of the Court's discretion once that condition is found. It seems to me that is a different question.

Senator METZENBAUM. I have just one last question. I have a number of other cases of this same kind of judicial activism, but my real question is this: Is not the matter of judicial activism a question of which side of the court you are on—and I mean tennis court, not the court in the other sense—a question of which way the ball bounces as to whether one man's or one woman's judicial activism is not another party's legalistic approach to what should or should not be done, and that overreacting to the question of judicial activism could be just as bad as overinvolvement by the courts in attempting to make new law?

I would just hope that this question of judicial activism would not be of such a nature as to cause you to lean over backward or forward with respect to the actions of the Supreme Court, because I think it is these cliches that get us all in trouble. I do not think they will get you in trouble, but I at least for one would hope that the Court would not do less in meeting its responsibilities than it has done in the past in order to protect constitutional rights of the people of this country.

Judge O'CONNOR. Senator Metzenbaum, there is always a danger in oversimplification and in sloganism, and I understand that.

Senator METZENBAUM. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kansas, Mr. Dole.

Senator DOLE. Thank you, Mr. Chairman.

Judge O'Connor, in your testimony yesterday you expressed your feeling that it is not the job of the Court to establish public policy through its judicial work. As a practical matter we know that the Court has frequently found justification for such policymaking by expansive readings of the constitutional or statutory law.

Today we find courts running school systems, apportioning legislatures, managing railroads, and generally involved in a whole host of activities which would have been unthinkable a generation ago.

Sometimes those of us in the Congress feel that the Court has gone beyond interpretation of law to an extent that it makes it difficult to know who, in fact, is setting policy for our Nation.

We have talked generally about your philosophy of judicial restraint. I wonder if you might be more specific on the question of how that philosophy can be imparted to lower courts. Is there something that the Supreme Court might do to impart some of that restraint to lower courts?

Judge O'CONNOR. Senator Dole, I suppose every time the Supreme Court acts in terms of publishing an opinion that expresses a point of view that point of view is read and heard and considered by all the other Federal courts and the State courts.

To the extent that the Supreme Court expresses concepts of judicial restraint I assume that those are addressed.

Obviously, the other very simplistic answer is that judges, like lawyers, enjoy attending training programs, seminars, and so forth; and all of these means are constantly available for dissemination of concepts of appropriate judicial management and action.

BAKKE DECISION

Senator DOLE. I think also it appears to many of us on the outside at times that the Court avoids controversy and attack from outside sources by avoiding decisions on difficult issues until it is presented with a very narrow, well-defined case. There are a number of examples of that.

One I recall is the affirmative action decision—the so-called *Bakke* decision. The Court avoided a decision on the constitutionality of reverse discrimination until presented with the issue of quotas in that case.

Do you have any opinion on whether or not the Court shirks its responsibilities by following this practice—by waiting for just the right case, a very narrowly defined case?

Judge O'CONNOR. Senator Dole, I have not participated of course in the discussions that surround that particular activity.

I believe that the Court had previously rejected an affirmative action case on the grounds that the issue was then moot—in other words, that the plaintiff who had filed was no longer attending the institution and the question had become moot. That was not the situation, I gather, in *Bakke,* and the Court took jurisdiction.

The doctrine of not accepting a case which is moot is not an absolute one. Exceptions have been made in the past, particularly for those instances in which otherwise the case could never get to the Court.

However, in general the Court has attempted to, I suppose, accept jurisdiction of those cases in which it feels an issue has been appropriately raised that would lend itself to resolution.

Senator DOLE. So you are not concerned that they may, in effect, sometimes avoid coming to grips with a matter by waiting for some narrowly defined case to come before the Court?

Judge O'CONNOR. Senator Dole, of course it is a concern. We all hope that matters of great significance and in which there is a need for a final voice, if you will, are given the opportunity to be heard.

These are very delicate questions, I am sure, that have to be addressed on a case-by-case basis; and applying all the normal principles of review, is this case appropriate for acceptance?

I am sure that another factor of course is the tremendous number of cases and the limitation inherently that exists because of the incapacity to accept more than a fairly limited number of matters each term.

ILLEGAL ALIENS

Senator DOLE. Let me shift to another matter which is of considerable interest and probably will become more of interest—and maybe for that reason you cannot fairly comment on it.

The Court has never decided whether aliens who enter the United States illegally should be afforded the full protection and rights guaranteed under the 14th amendment.

The dispute finds recent expression in a suit filed against the State of Texas by certain organizations who claim that the State must make educational facilities available to the children of illegal aliens.

Do you have any general views as to the extent to which due process and equal protection rights should be afforded to illegal aliens?

Judge O'CONNOR. Senator Dole, that is an issue that is currently either awaiting certiorari or has been accepted. It is a matter which is going to make its way I think soon to the U.S. Supreme Court and a matter of grave concern to many people.

Our country has, as you know, received within its borders in recent years large numbers of illegal aliens; and the question of the right of those individuals to a public school education, for instance, and other rights is a matter that is of concern to many and which does raise serious constitutional questions, and those questions are likely to be heard soon, I believe.

Certainly with regard to the subject of aliens generally the Court's primary reported decisions have really dealt with those who are legally in the country, and various standards for review—in fact, a rather strict standard for review—in many instances has been applied to cases arising in that area.

Senator DOLE. I certainly accept that answer. I am certain this case will find its way to the Court, and you will be asked at that time I assume to apply the proper principles of law or equity.

I addressed a question to you yesterday with reference to the exclusionary rule following a question asked by Senator Laxalt, and I think there was a question asked this morning by another member of the committee. You responded with an example of a case in which you had to exclude wiretap evidence under title 3 of the 1968 Omnibus Crime Control and Safe Streets Act.

In that legislation Congress attempted to provide for admissibility of wiretap evidence under a formula which called for court supervision over the use of electronic surveillance techniques by Federal and State enforcement authorities.

This statutory scheme has subsequently been upheld by the Supreme Court, and this scheme could well serve as a precedent for other congressional efforts to limit the scope of the exclusionary rule.

I would be interested in receiving your thoughts on your problems with the 1968 act in the cases you referred to yesterday.

Judge O'Connor. Senator Dole, for one thing the act applied to information obtained by private individuals in addition to those who are peace officers. The exclusionary rule as we know it under the fourth amendment is applicable only to information or evidence obtained by peace officers. If a private individual obtains evidence illegally it is not excluded in court in a criminal action based on the exclusionary rule.

However, Congress in that act has applied it not only to peace officers but to information or evidence obtained by private citizens.

In addition, the act by its terms I believe makes a blanket prohibition of the use in court and provides for no "good faith" exception, if there is such a thing, as has been addressed in some of the Federal courts with regard to the criminal exclusionary rule.

Senator Dole. Finally, I was not able to be here this morning, but we were monitoring the session, and I understand that Senator Thurmond asked a question concerning the second amendment right of citizens to keep and bear arms.

Your response, as I understand it, included the citation, *United States* v. *Miller*—one of the few instances where the Supreme Court has ruled in recent years on the scope and meaning of the second amendment.

In that case the Supreme Court upheld the constitutionality of the National Firearms Act of 1934. That act was based on Congress' power to place transfer taxes and national registration on gangstertype weapons such as machine guns and sawed-off shotguns.

These and similar weapons, however, certainly would be appropriate for use by militias or State militias, and it seems to me that the state of the art firearms technology of that decision would be open to question if the matter came before the Court again.

In these days—and I think as recently as yesterday—we hear announcements of increased crime rates, especially violent crimes committed with firearms.

Can the several States or the Federal Government impose restrictions on private possession and use of sporting firearms without violating the constitutional guarantees of the second amendment?

Judge O'Connor. Senator Dole, possibly there is a difference under the second amendment question with respect to what the States can do and what the Federal Government can do. At least that is a possibility.

The *Miller* case addressed the power of Congress to enact certain prohibitions under the commerce clause of the carrying of certain types of weapons.

In a very brief decision actually, the Court simply held that the second amendment did not guarantee the right of people to have a certain type of weapon but rather was addressed to a prohibition against Congress interfering with the maintenance of a State militia.

We just do not have additional determinations by the Court of the meaning of that act. We do know, however, that the States, acting in their police power, have adopted a wide range of statutes regulating the possession and use of firearms.

It is a matter of great concern to many people. In Arizona at least that regulation has been limited by and large to a regulation prohibiting the carrying of concealed weapons and provisions limiting the use of weapons at all in certain inhabited areas, regulations concerning the use of firearms by the very young, and also statutes that impose additional penalties on people who commit crimes involving the use of weapons.

It has been the view, at least in our State, of the legislators at this point that the legislative power if it exists to further limit the use or ownership of firearms by citizens for sport purposes or for self-defense should not be limited. I think that has been a policy decision at the legislative level and not tested under the second amendment that is applicable.

Senator DOLE. Judge O'Connor, the other questions I have you have addressed, I think, directly or indirectly. I yield back the balance of my time, and I want to indicate my strong support for your nomination.

Judge O'CONNOR. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Arizona, Mr. DeConcini.

PROBLEM OF CRIME

Senator DECONCINI. Mr. Chairman, thank you.

Judge O'Connor, thank you for your fine testimony today. It has been exceptional, as was yesterday's.

I would like to address a couple of general areas with you. If you can labor through them I would be most appreciative.

The problem of organized crime, violent crime, and drug-related crime in this country has surfaced once again as a primary subject and a primary objective of many of us in the Senate; and certainly now the administration has come forward with a, not termed a "war on crime," but some specifics; and I think some of them are very positive. A number of Senators here have suggested specific legislation.

I wonder, Judge O'Connor, if you could just characterize in a general sense what you believe—first of all, if you agree that it is the problem that I believe it is; and, second, what you believe the Court can do and should do to participate in a more active way or passive way, but in some way, to bear some of the burden of improving the safety of the citizens of this country?

Judge O'CONNOR. Senator DeConcini, you have done a tremendous amount of work in this particular area, perhaps because of your background in law enforcement in Pima County and your continued interest thereafter at the State level and this body.

It seems to me that it is a subject of tremendous concern to a tremendous number of people.

We have truly an unacceptably high crime rate in our Nation. We certainly have an unacceptably high crime rate in the State of

Arizona and in the city of Phoenix and surrounding areas. All public officials in our area have exhibited a real concern about it.

It seems to me that there is no avenue, whether it be legislative or judicial, that should not be explored to see how we can improve the situation.

If I had an answer to these problems of how to instantly reduce crime I would be more than happy to give them to you; I do not know.

But we must, I think, within the judicial system itself strive constantly to resolve criminal cases rapidly. I think delay in that area simply promotes a disillusionment of people with the ability of the system to function. So we have to be concerned about the speed with which we handle these matters.

I think we have to be concerned within the judicial branch about at what point we can say that a case has been fairly litigated and fairly reviewed on appeal or on post-conviction review and now it is at an end. There must be some way to more effectively do that. That has to be a concern of people on the bench as well as legislators.

We have to be concerned, I suppose, with the imposition kf fair and appropriate remedies. It will always be a concern, I am sure, to judges on the bench that there are appropriate facilities in which to place convicted defendants if an incarcerative sentence is appropriate.

We have to be concerned, I think, with insuring that there is the power at least to order those who are convicted to make restitution in appropriate instances and the means of enforcing that.

Senator DECONCINI. Judge O'Connor, you spell it out well. Obviously, you feel the Court has a responsibility and should be a partner in any effort by any government, whether it is State or Federal, to attempt to improve the quality of life by lessening the crime.

Mr. Chairman, I would like to call to the committee's attention a letter, dated September 9, 1981, from Congressman Bob Stump, the Congressman from the third district of Arizona. I understand the chairman is going to insert it in the record in the proper place.

I want to explain to Judge O'Connor that Congressman Stump has written a very laudatory letter, one that is very explicit about serving with you in the Arizona State Senate when he was minority leader and you were majority leader. I will furnish you a copy of it.

I am very pleased that that will be in the record.

The CHAIRMAN. Without objection, that letter will be placed in the record. I intended to do it at the conclusion of the questions by the Senators, but I can do it now if you wish.[1]

Senator DECONCINI. No. That will be fine, Mr. Chairman. I just wanted to call it to the attention of Judge O'Connor.

Judge, in your William and Mary law review article—which I am sure now you probably wish you had published and had a royalty from the sale of those that everyone will be clamoring for—you go into the area of more involvement of the State courts. You comment on the expanded jurisdiction that Congress has recently granted to the Federal magistrates and the bankruptcy judges.

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[1] Letter can be found on page 216.

Do you feel that there is room for continued expansion of the role of these officials and these courts and others like them that might alleviate the burden on the article 3 courts, providing obviously that it does not diminish quality of justice?

Judge O'CONNOR. Senator DeConcini, I suppose we will want to look at the results of the expanded jurisdiction and the bankruptcy level to see in fact how that works and if it is a satisfactory solution.

I think that it is not inappropriate to consider the establishment of additional tribunals or different tribunals to handle a specific aspect of the workload, and I am sure that lawyers everywhere will be wanting to monitor the work of the new bankruptcy court. I think you had a substantial responsibility in connection with that legislation.

Senator DECONCINI. Do you think it is worth pursuing, whether it is on a trial basis or otherwise, an attempt to broaden the jurisdiction of other than article 3 courts to attempt to relieve and provide some other access to the courts other than just the article 3?

Judge O'CONNOR. It merits consideration. I hope that it is not always at the expense of State participation or involvement.

COURT ADMINISTRATION

Senator DECONCINI. The problem of court administration has greatly increased over the past 15 years or so. On the Federal level Chief Justice Burger has been keenly aware of the problem and has attempted in a very positive manner to deal with it; and though I have not agreed with everything he has said or done certainly it is an improvement, in my opinion.

In addition to your work, assuming you are confirmed—and I am sure that that is going to happen—on specific cases that you will handle as an Associate Justice, do you anticipate that you will be active in a broad sense in court administration? Are you bent in that direction at all? Do you feel it is a proper area for you to delve into, and can you share with us any ideas or what your direction will be?

Judge O'CONNOR. Senator DeConcini, I do have an interest in court administration. It is very important to me because, having been a judge, it has become apparent to me that effective court administration is essential in this day of burgeoning caseloads in both the State and the Federal courts. The numbers are such that unless we do the job more efficiently we are not going to do it well.

I think my greatest concern has been in the area of delay. We have made efforts both at the State and Federal level to handle criminal cases more expeditiously, and mandates have been legislated to require that.

This is at the expense then of the ability of the courts to handle expeditiously general civil litigation. People who have to wait, for example, to go to trial in a civil case are being denied justice, in my view, very dramatically. That simply is not acceptable in our system.

We have to find ways to make the system work so that people can have more rapid access to the courts when access is needed. So court administration is a vital tool in this area.

I participated in an experiment in the trial court in Maricopa County to provide speedier trial practices for civil cases generally. That experiment was very, very successful, thanks largely to the efforts of presiding Judge Bloomfield.

I think there is room for improvement nationwide in this area. I have an interest. Whether I will be encouraged or even allowed by virtue of time pressures to engage in that if I were to be confirmed for the U.S. Supreme Court I cannot say, but time and other circumstances permitting I would be very interested.

Senator DeConcini. You are not reluctant to get involved in it assuming the time is there?

Judge O'Connor. No.

Senator DeConcini. You mentioned the experiment in Maricopa County. After you are confirmed I do not know if we will be able to ask you over, Judge, to testify and give us a little background on that. Can you just tell us very briefly—because it has been a great interest of mine—how that project did succeed?

Judge O'Connor. The project for the civil delay reduction had several components. One was that we required that lawyers be ready for trial much sooner than normally is the case, so it compressed their preparation time substantially.

Senator DeConcini. What happened if they were not ready?

Judge O'Connor. There were always avenues if justice truly required it to extend the time, but we found that in the great bulk of cases it was not required.

Then the lawyers were given a specific date on which the matter would go to trial, and there was a no continuance policy. So the lawyers who came in and had a vacation or had other reasons for continuing the case were simply turned aside, and we went ahead on the trial date that was scheduled. If the particular judge to which it was assigned was already in trial then another courtroom and another judge were found, even if we had to go to the community to find judges pro tempore.

The system had the effect of encouraging a great many settlements, and those that did not settle did go to trial as scheduled, and it was very effective.

Senator DeConcini. Has Maricopa County adopted that on any larger basis, or has any other jurisdiction in Arizona, to your knowledge?

Judge O'Connor. Senator, Maricopa County has greatly expanded the program due to its success.

Senator DeConcini. I want to compliment you and the court system there for that trial experiment. Obviously, I think it has been successful from what I have heard, even though there has been a little moaning and groaning by members of the trial bar there, but I think that is a good sign.

Judge O'Connor, much of the Federal courts' judicial and nonjudicial activities are conducted behind and beyond the public eye. The executive and legislative branches have opened many of their proceedings to public scrutiny under the so-called sunshine laws, particularly in those areas of the Federal court nonjudicial work, such as meetings of the Judicial Conference of the United States or the council meetings of the various circuits where no cases are discussed or no debate is focused and the decisions are administrative or quasi-legislative matters.

Do you think it would help the process at all if some sort of sunshine laws were applicable in this specific area of the judiciary?

Judge O'CONNOR. Senator DeConcini, you mean concerning only the conference matters, or the rulemaking function, or policymaking functions?

Senator DECONCINI. Yes.

Judge O'CONNOR. I really do not know whether sunshine laws would be helpful in that regard or not. I have not had information as yet on the extent to which opening the meetings has been productive or nonproductive. I can speak only from my experience as a legislator in which I did support open meeting laws in Arizona and operated extensively in the public sector under those laws and have found it satisfactory. I have not had experience at the judicial level with that application.

Senator DECONCINI. Do you think it is worthy of some consideration by the judiciary and some debate within the judiciary?

Judge O'CONNOR. Senator DeConcini, that is not inappropriate at all to expect it to be discussed and considered.

Senator DECONCINI. Judge O'Connor, I want to thank you again for your fine testimony the last 2 days.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank you.

Senator Simpson was next, but he is not here. Senator Leahy, the distinguished Senator from Vermont, is next.

JUDICIAL ACTIVISM

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate the opportunity to be here as I mentioned before.

As I think some of us have mentioned to Judge O'Connor, unlike the chairman, for some of us this is the first time that we have been present at the confirmation hearings of a Supreme Court Justice. That is only one small reason for the good attendance by Senate standards at these hearings. I think Judge O'Connor's personality and abilities are the main reason. I am glad we have had this opportunity.

Judge, I would like to follow up on a point raised earlier this morning by Senator Specter.

In *Brown* v. *Board of Education* I suppose we go back and forth on the question of whether we were trying to determine judicial activism, whether it is a question of judge-made law or simply further research into the old law—why we have *Brown* v. *Board of Education* as law today and not *Plessey* v. *Ferguson.*

I would just read from one part of *Brown* v. *Board of Education* because I quite frankly had not read it since law school days and went back and reread it. That is the part in the Chief Justice's decision where he says,

> * * * in approaching this problem we cannot turn the clock back to 1868 when the amendment was adopted or even to 1896 when *Plessey* v. *Ferguson* was written. We must consider public education in the light of its full development and its present

> place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

I state that simply—and I do not mean to get back into the whole debate on it all over again—because in my mind it appears more that the Court in effect was making law rather than simply finding some new interpretation of the Constitution.

Judge O'CONNOR. Senator Leahy, the Court did hold ultimately that separate educational facilities in the public school system were inherently unequal under the equal protection clause.

The Court did, of course, ask for extensive historical research and data in connection with its study of the problem.

In its written opinion you are correct in stating that the Court did not particularly refer to the historical analysis in reaching its decision. However, the effect of it is to determine that the equal protection clause meant what it says and that separate is not equal.

I suppose that most students of the law today would agree that that was an appropriate interpretation of that language.

To an extent, and certainly in its famous footnote, it referred to matters that traditionally are not referred to by the Court in reaching those solutions, and that of course was the subject of a lot of attention at the time.

Senator LEAHY. Of course what is judicial activism to some may probably be strict constructionism to another.

I recall probably one of the most memorable days I spent in law school, and that was the day I was selected to have lunch with Hugo Black.

Hugo Black was seen by many people certainly as a judicial activist. I recall him saying—I recollected it I believe this morning when Senator Mathias mentioned him—his views of the first amendment.

He said,

> The First Amendment says there should be no abridgement on the right of free speech, and I read that as a strict constructionist meaning there should be no abridgement on the right of free speech.

He was adamant on that.

In applying that standard of course in some of the decisions he wrote he was accused of judicial activism.

In a decision that your immediate predecessor, Justice Stewart, wrote in 1972—he said, quoting *United States* v. *Bass,*

> Unless Congress conveys its purpose clearly it would not be deemed to have significantly changed the Federal/State balance. Congress has traditionally been reluctant to define as a Federal crime conduct readily denounced as criminal by the States. We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between Federal and State criminal jurisdiction.

I would assume that that would be along the lines—without going into that particular case—of how you feel a Justice should approach a case involving judicial construction and federalism?

Judge O'CONNOR. I think that was an appropriate statement, Senator Leahy.

Senator LEAHY. The reason I mentioned the difficulty is that in that same case Justice Douglas dissented—and here is somebody who is seen very much as an activist—where he said,

> The Court today achieves by interpretation what those who were opposed to the Hobbs Act in this case were unable to get Congress to do.

He was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, who were all convinced that Congress had intended to usurp the power of State government to prosecute violence committed during a lawful labor strike in this particular case.

I am a former prosecutor, and I think Justice Stewart was correct. I agree with his statement. He strictly construed the statute and deferred to State authorities to prosecute acts of labor violence.

Our distinguished chairman of course has been here much longer than I have. He now feels that we need legislation that would make labor violence a crime to be handled by Federal authorities. So the issue can go back and forth. I am not really looking for an answer. I am just saying that we can make a bad mistake, and those who report on these hearings can make a bad mistake by trying to fit any one case or any one Justice into a one-line definition. I think you would agree on that.

Judge O'CONNOR. Yes; I would. I would also simply comment that Congress can be very helpful of course to the courts if it indicates what its intention is when it passes legislation as to whether it intends to preempt State jurisdiction or not. Sometimes those direct expressions can be most useful to the courts.

RIGHT TO PRIVACY

Senator LEAHY. I could not agree with you more. I think we make a bad mistake in the Congress where, in trying to get legislation through that everyone can rally around, we make it sometimes either too bland or too nonspecific, and then we pass it on to the regulators for applicable regulations. They have little to guide them. You put one more layer in there, and everyone sits back comfortably thinking that at some time or another some advocate for one side or another will bring it before the Court for the Court to work it out. That is a bad situation.

I know that there are areas where we will continue to have regulation and litigation. I know of your own fights in Arizona for tough antipollution controls, which bring about regulations and litigation, but it is a price that society should be willing to pay.

The Constitution does not speak of a right to privacy, but lately the question of a right to personal privacy comes up in opinions more and more. Do you have any views on that right within the Constitution?

Judge O'CONNOR. Senator Leahy, you are correct that the Constitution does not mention the right to privacy directly. The Constitution has been interpreted though by the Court as carrying with it a penumbra of rights under the Bill of Rights, and within that doctrine the Court, I think in *Griswold* v. *Connecticut,* first addressed directly and recognized a right of privacy. That was the case involving the right to sell or possess contraceptive devices in that State and overturned a State statute prohibiting that.

The right to privacy has been recognized again by the Court in several other cases, one involving the possession I believe of some obscene material among other things.

The Court seems to have established that there is such a right.

Senator LEAHY. How do you feel on that?

Judge O'CONNOR. I accept the fact that the Court has established that.

The ninth amendment of course refers to a reservation to the people of other rights not enumerated. I do not believe the courts have directly pinned the right of privacy to the ninth amendment by any means; but it is simply a reference or an acknowledgement, if you will, in the Constitution that people do have certain other rights that are not enumerated.

WILLIAM AND MARY ARTICLE

Senator LEAHY. Reference was made once more to the William and Mary article. Just as a matter of curiosity, how did you come to write that article?

Judge O'CONNOR. I am beginning to wish, Senator Leahy, that I never had. [Laughter.]

However, the William and Mary Law Review in its wisdom was aware that the relationship of our dual system of State and Federal courts and their workings is an unusual one in terms of the international field—other nations do not have such systems—and that inherent in such a dual system are certain areas of concern and interrelationship that is of interest at least to those in the system.

The Law Review decided to invite some noted legal scholars to write some major papers on the subject and then decided to invite several Federal and State court judges to participate in the seminar and in the panel discussion and to make remarks.

That sounded to me like it would be fine—as a State court judge I would be happy to participate—and after I said fine I learned that they would like an article in addition. That is how the article came about.

Senator LEAHY. Judge O'Connor, I am in one moment going to do something that Senators do only with the utmost reluctance, and that is yield back the balance of time available to us. We do this even with more reluctance if there is a television camera going somewhere.

I will just simply repeat what I said yesterday and what I said earlier when we met in my office: I really do not care whether an appointee to the U.S. Supreme Court is Republican, Democrat, conservative, or liberal. I care about competence, honesty, and integrity. I feel that you have certainly demonstrated that throughout these hearings, and I will very enthusiastically vote for your confirmation.

Judge O'CONNOR. Thank you, Senator.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina, Mr. East.

Senator EAST. Thank you, Mr. Chairman.

Mr. Chairman, before I begin my questioning I would like to request that a memorandum that has been prepared by the staff of the Subcommittee on Separation of Powers dealing with the subject of appropriate questions for the nominee to the Supreme Court be made a part of the record of these hearings. I would like to make that request.

The **Chairman**. Without objection, it is so ordered.

[Material follows:]

Memorandum on the Proper Scope of Questioning of Supreme Court Nominees at Senate Advice and Consent Hearings

To: Subcommittee on Separation of Powers
Senator John East, Chairman

From: Grover Rees III
Assistant Professor of Law, The University of Texas (on leave 1981-82)
Counsel, Subcommittee on Separation of Powers

September 1, 1981

I. Introduction

In a few days the Senate Judiciary Committee will hold public hearings on the nomination of Sandra O'Connor to serve as a Justice of the United States Supreme Court. There is currently a great deal of interest in what questions Senators will ask Judge O'Connor at the hearings, and in whether she ought to answer specific questions about her views on constitutional questions. This interest has been generated partly because of the controversy over Judge O'Connor's public record on the abortion issue, but also because of a relative uncertainty, among Senators and the interested public, about her general constitutional philosophy. In her public career as a legislator and as a state court judge, Judge O'Connor had few occasions on which to express her opinions on constitutional questions. The Senate advice and consent hearings, therefore, will constitute an unusually large part of the public record when the Senate votes on her nomination. It is thus especially important that Senators be informed on the proper scope of questioning at advice and consent hearings on Supreme Court nominees.

Understandably but unfortunately, most of what has been said and written on this question has been in the context of specific questions to specific nominees. The

Senators and the nominees concerned tend not to have given the question much advance consideration, and they tend to divide up according to their relative enthusiasm for the nomination at hand, with the strongest opponents favoring the broadest scope for questioning and some of the nominees themselves taking the narrowest view. Before turning to the record of prior confirmation hearings, therefore, it will be helpful to consider whether any rules for questioning can be deduced from generally accepted propositions about the role of a Supreme Court Justice and the role of the Senate in advising and consenting to Court nominations.

The controversy over questioning at confirmation hearings stems from a tension between two incontrovertible propositions: First, the Senate has a duty to exercise its advice and consent function with the most careful consideration and the greatest possible knowledge of all factors that might bear on whether the nominee will be a good or a bad Supreme Court Justice. Second, a Justice of the Supreme Court owes the litigants in each case his honest judgment on what the law is, and such judgment would be compromised if a nominee were to promise his vote on a particular case or class of cases in an effort to facilitate his confirmation.

These two duties are in tension but not necessarily in contradiction. They suggest a series of standards by which to judge the propriety of a question put to a Supreme Court nominee at advice and consent hearings:

1) Does the question seek information that it would be proper for a Senator to consider in deciding whether to vote for or against a nominee's confirmation?

2) Can the nominee answer the question without violating his obligation to decide honestly and impartially all the cases that will come before him as a Justice?

3) If there is a possibility that by answering the question the nominee might risk a violation of his future obligations as a Justice, but the information is relevant to the decision the Senator must make, can the information be obtained in some other way than by asking the nominee?

4) If relevant information cannot be obtained otherwise than by asking the nominee, can the question be asked and answered in such a way as to minimize the risk of compromising the nominee's future obligation as a Justice?

It is the purpose of this memorandum to inquire whether, according to these standards, it would be proper for Senators to expect Judge O'Connor to answer specific questions about her views on constitutional law. The memorandum will also deal with the propriety of questions and answers about the nominee's views on social, economic and political matters. Precisely because these two classes of questions are closely related, it is important to bear in mind that they present different problems. For instance, the question whether a nominee personally favors abortion (or the death penalty, or pornography) may be asked and answered with little risk of compromising a future case, since a judge's personal views on the merits of an issue are supposed to be irrelevant to his judgment on whether the Constitution requires or prohibits a certain result; yet exactly insofar as the nominee's personal views are irrelevant to future cases, it may be improper for a Senator to cast his confirmation vote on the basis of what those personal views are. A nominee's views on whether laws against abortion are constitutional, however --- or on any other constitutional question --- are highly relevant to the nominee's future performance as a Supreme Court Justice, and may therefore be a proper reason for a Senator to vote for or against confirmation; yet it has been suggested that a nominee may not share these highly relevant views with Senators, lest their expression be construed as a promise to vote a certain way in a future case.

With regard to the nominee's views on questions of constitutional law, therefore, and also with regard to political, social and economic views, this memorandum will consider first whether such views may properly be considered by Senators in casting their confirmation votes. The next inquiry will be whether expression of such views at confirmation hearings could be a basis for disqualifying a Justice from participating in the Court's consideration of a case, or might otherwise be regarded as tainting the Justice's participation in such a case. Finally, illustrative questions, answers and approaches to the problem taken by Senators and nominees at past confirmation hearings will be discussed.

II. The Scope of the Duty to Advise and Consent to Supreme Court Nominations.

Article II, section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ." There is broad agreement among constitutional scholars that the Senate's duty to "advise and consent" to Supreme Court nominations is at the very least an obligation to be more than a rubber stamp for the President's choices. The most widely cited modern discussion of the question is by Professor Charles Black of the Yale Law School, who wrote in 1970 that "a judge's judicial work is . . . influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time."[1] Professor Black argued that in voting on whether to confirm judges --- who, unlike officials of the executive branch, "are not the President's people. God forbid!"[2] --- Senators have a duty to consider the judge's views on such questions, just as the President considers their views in deciding whether to nominate them. "In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in a man's fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unecumbered by deference to the President's, as a satisfactory basis in itself for a negative vote."[3]

Charles Black is a great and honest scholar whose work has long been admired by students of the Constitution of all political and philosophical views, but it is not inappropriate to note that he is a liberal Democrat who was writing in an age when the President was a conservative Republican and the Senate was controlled by liberal Democrats. It is interesting to observe the similarity of Black's views to those expressed in 1959 by William Rehnquist, a conservative Republican who had then recently served as a Supreme Court clerk. Discussing the Senate debate on the nomination of Justice Charles Whittaker, Rehnquist complained that the discussion had

> succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.[4]

Rehnquist distinguished the Senate's duty in voting on the nomination of a judge of a lower federal court --- whose principal duty is to apply rules laid down by the Supreme Court, and whose integrity, education and legal ability are the paramount factors in his qualification --- from the confirmation of a Supreme Court Justice:

> The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making --- the "due process of law" and "equal protection of the laws" clauses --- are about the vaguest and most general of any in the instrument. The Court in Brown v. Board of Education, [347 U.S. 483 (1954)], held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.
>
> Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? . . . . The only way for the Senate to learn of these [views] is to "inquire of men on their way to the Supreme Court something of their views on these questions."[5]

Both the Black and the Rehnquist articles take the position that it is proper for Senators to vote for or against Supreme Court nominees on the basis of social, economic and political views. It is important to note that the basis for this position is the suggestion that, rightly or wrongly, such views are likely to affect the future Justice's positions on questions of constitutional law. Therefore it is at least as proper for Senators to vote on the basis of nominees' views about the meaning of the Constitution per se --- the text and history of the document itself --- as on the basis of views that are relevant only insofar as they will indirectly affect the Justice's constitutional philosophy.

It is also important to note that some students of the Constitution believe that at least some parts of the Constitution really are "there," with clear meanings and leaving little room for injection of the judge's own views. If a Senator believed that a certain constitutional question had a right answer and a wrong answer, then it would be at least as proper for the Senator to vote against a Court nominee who disagreed with him on this question as it would be for the Senator to vote against a nominee whose social or political philosophy made it likely that he would disagree with the Senator in an area where the text of the Constitution was less clear. This is especially true today, when disagreements over constitutional law are often framed in terms of whether the Court ought to "make law" or "interpret the Constitution." To the extent that a Senator believed that a judge could reach a certain result only by "making law," that Senator would be justified in voting against a nominee who reached that result. The difference in result would be evidence of a difference in constitutional philosophy.

Other scholars have generally agreed that social and economic philosophy, insofar as they reflect on a judge's likely position on constitutional issues, are legitimate bases on which Senators might vote to confirm or reject Supreme Court nominees.[6] As recently as last May two prominent constitutional law professors, testifying before the Subcommittee on the Separation of Powers in opposition to the proposed Human Life Bill, suggested that the advice and consent power may legitimately be used to influence the Supreme Court's decisions on constitutional questions. Professor Laurence Tribe of the Harvard Law School testified that "Congress has not been without important devices for making its will felt and known through amending the Constitution . . . . However, apart from amendment, there are other measures. . . . There are a great many things that can be done legislatively, not the least of which is expressed through the power of advice and consent in the Senate when appointments are made to the United States Supreme Court."[7] Professor William Van Alstyne of Duke University Law School agreed with Professor Tribe that "[i]t is not illicit of Congress to make its displeasure [with a Supreme Court decision or a pattern of such decisions] felt incidental to the appointment process."[8] These remarks were made in response to a question by Senator East asking what actions Congress might take to effect a reversal of Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court decision holding that the Constitution contains a right to abortion.

If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are. Before turning to whether a nominee's future obligations as a Justice may bar him from answering questions which the Senator otherwise seems to have a duty to ask, one should observe that the nominee's views, unlike his other qualifications, will often be difficult for the Senator to ascertain except by directly asking the nominee. Education and experience can be reduced to lines on a resume. Integrity can be attested to by witnesses other than the nominee. Even the presence or absence of a "judicial temperament" might be deduced by observation of a nominee testifying on subjects that are general and in no way sensitive. Yet unless the nominee has a long prior record of writings, speeches, and/or lower court opinions on constitutional issues --- a condition met by many Supreme Court nominees, but not by Judge O'Connor --- the advice and consent hearings constitute the only forum in which Senators can learn of the nominee's philosophy.

It should also be observed that useful knowledge about questions of constitutional law will rarely be gained except through specific answers to specific questions, usually about actual or hypothetical cases. Almost all Supreme Court nominees have testified that they are "strict constructionists" who believe courts should always "interpret the Constitution" and never "make law." Justice Blackmun, for instance, testified at his confirmation hearings that

> I personally feel that the Constitution is a document of specified words and construction. I would do my best not to have my decision affected by my personal ideas and philosophy, but would attempt to construe that instrument in the light of what I feel is its definite and determined meaning.[9]

Several years later Justice Blackmun wrote the Court's opinion in Roe v. Wade, supra, which is generally regarded as among the most extreme examples of judicial preference for "personal ideas and philosophy" over textual and historical sources of constitutional law. Justice Fortas, a Warren Court member generally regarded as a "liberal," was asked to what extent he believed "the Court should attempt to bring about social and economic changes," to which he responded, "Zero, absolutely zero."[10] Professor L.A. Powe of the University of Texas Law School concludes that "Senate questioning has proved astonishingly ineffective in eliciting the desired information. Questions can always be answered less specifically than desired. . . . If the questions were inartfully drawn and left room for maneuvering, one can fault the senators, but the nominees understood the purposes of the questions --- their responses simply were not designed to assist the Senate."[11]

Labels can be misleading. A judicial nominee might sincerely consider himself a "strict constructionist" and yet believe that the Constitution guarantees rights to abortion, racial balance in the public schools by means of mandatory busing, and other things that an equally conscientious Senator might regard as evidence that the nominee is reading his own social, political and economic views into the Constitution. By the same token, a self-styled "progressive" nominee might believe in a "living Constitution" yet be convinced that the Constitution does not forbid the states from operating segregated schools. If the nominee has a duty not to discuss specific doctrines --- and specific past Supreme Court cases, which are the building blocks of doctrines --- then he has a duty not to provide the Senate with more than labels and slogans. These will not help, and may actually obstruct, Senators in performance of their duty to advise and consent only to nominees whose views they believe to be consistent with the Constitution.

III. Statements at Confirmation Hearings as Bases for Disqualification or as Evidence of Prejudice

A nominee's discussion of questions of constitutional law at confirmation hearings, outside the context of specific pending cases, is not a proper basis for his disqualification from cases involving these questions that come before the Court after his confirmation. Nor should such discussion be viewed as evidence that the nominee will not honestly and impartially decide future cases.

The statute governing disqualification of Supreme Court Justices is 28 USC § 455, which provides:

> Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, or appeal, or other proceeding therein.

In the case of Laird v. Tatum, 409 U.S. 824 (1972), respondents had urged Justice Rehnquist to disqualify himself. One ground for the proposed disqualification was that prior to his nomination as a Supreme Court Justice he had publicly spoken about the constitutional issues that were raised in the case. After noting that the statute did not seem to require disqualification on the ground that the Justice had made public statements, Justice Rehnquist stated that public statements about the case itself might constitute a discretionary ground for disqualification, but he sharply distinguished public statements about what the Constitution provides, outside the context of the specific case on which disqualification is demanded. Rehnquist's history of the modern Court's attitude toward public statements by Justices disposes of the argument that such statements are grounds for disqualification:

> My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.
>
> Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S Rep No 884, 75th Cong. 1st Sess (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v Local 6167, UMW, 325 US 161, 89 L Ed 1534, 65 S Ct 1063 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly crit-

icized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. "The Labor Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-La-Guardia Act, 47 Stat 70, 29 USC §§ 101–115 [29 USCS §§ 101–115]. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v Hutcheson, 312 US 219, 85 L Ed 788, 61 S Ct 463 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v Christensen, 340 US 162, 95 L Ed 173, 71 S Ct 224 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it), 340 US, at 176, 95 L Ed 173. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length the doctrine expounded in the case of Adkins v Children's Hospital, 261 US 525, 67 L Ed 785, 43 S Ct 394, 24 ALR 1238 (1923). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v Parrish, 300 US 379, 81 L Ed 703, 57 S Ct 578, 108 ALR 1330 (1937), in which a closely divided Court overruled Adkins. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel and

> [illegible] when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, supra, 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Christensen would have preferred not to argue before Mr. Justice Jackson;* that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v Judicial Council, 398 US 74, 137, 26 L Ed 2d 100, 90 S Ct 1648 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, e.g., the opinion of Mr. Justice Harlan, joining in Lewis v Manufacturers National Bank, 364 US 603, 610, 5 L Ed 2d 323, 81 S Ct 347 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v Street R. Co. 196 US 539, 49 L Ed 591, 25 S Ct 327 (1905), reviewing, 182 Mass 49 (1902); Dunbar v Dunbar, 190 US 340, 47 L Ed 1084, 23 S Ct 757 (1903), reviewing, 180 Mass 170 (1901); Glidden v Harrington, 189 US 255, 47 L Ed 798, 23 S Ct 574 (1903), reviewing, 179 Mass 486 (1901); and Williams v Parker, 188 US 491, 47 L Ed 559, 23 S Ct 440 (1903), reviewing, 174 Mass 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, supra, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.

409 U.S. at 831-36 (footnotes omitted.)

Since a Justice has discretion to disqualify himself whenever his past association with a case would make it improper for him to sit on the case, the consistent refusal of Justices to disqualify themselves in areas where they had previously expressed their views on the law strongly suggests that these Justices did not regard such statements as evidence of prejudice. If a statement prior to nomination would not constitute prejudice, then neither would the same statement made after nomination but before confirmation -- nor, for that matter, a statement about an abstract question of constitutional law or about a past Supreme Court case by a sitting Justice. As Justice Rehnquist concluded in Laird, supra:

> The oath. . . . taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.

409 U.S. at 838-39.

The most persuasive argument against discussion of specific questions of constitutional law by nominees at confirmation hearings is not that this will prejudice their decisions in future cases, but that they will be tempted to alter their positions in order to facilitate confirmation, or that the public will perceive such trimming even if it does not actually occur. Indeed, Justice Rehnquist added a footnote in his Laird opinion expressing this concern:

> In terms of propriety rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

409 U.S. at 836 n.5. This statement is in direct conflict with the sentiments expressed in Rehnquist's 1959 article on the need to "inquire of men on their way to the Supreme Court something of their views on these questions," but it is not unpersuasive. Indeed, if it were not so important that Senators have the necessary information with which to comply fully with their duty to advise and consent to Supreme Court nominations, Rehnquist's concern about the appearance of impropriety might be dispositive. If, however, a way can be found for the nominee to share relevant information with the Senate without giving rise to a suspicion of bribery or blackmail, then the duty to cast an intelligent vote on the nomination --- and the nominee's duty to assist Senators in casting such votes by answering candidly all relevant and proper questions --- become paramount.

The tension between the Senators' and the nominee's respective duties can be resolved, first, by a good faith effort to understand each other's problems. Such understanding would entail a mutual recognition that a candid discussion of a question of constitutional law at a confirmation hearing is not a promise to vote a certain way. This is true precisely because of the judicial oath cited by Justice Rehnquist in his Laird opinion. A Supreme Court Justice promises to consider all arguments raised by counsel in briefs and oral arguments in all the cases that will come before him. There is also the prospect of collegial decision-making, and of the changes that time, experience and study can effect in any person's attitudes and beliefs. Insofar as a statement that Roe v. Wade was wrongly decided or Brown v. Board of Education rightly decided is not given or taken as a promise of a vote in all future cases on abortion or civil rights, the spectres of bribery and blackmail are banished. Nor is it too much to expect of our Supreme Court nominees enough integrity to resist the temptation actually to change their views, or to pretend such a change, in order to secure confirmation.

Even with the best of faith, some questions will go too far. It is improper for a nominee to comment on a specific pending case, because here the appearance of impropriety --- the possibility that expectations will be raised which the Justice will be reluctant to disappoint, and consequently the Justice's unwillingness to give full consideration to a specific set of briefs and oral arguments --- is far greater than in a case where a Felix Frankfurther happens to sit in a labor case or a Thurgood Marshall in a civil rights case. For the same reason, a hypothetical question that is too similar to a case now pending before the Court, or likely to come before it soon, would be unacceptable. Insofar as actual prejudice can be avoided, however, the prospect of improper appearances must be balanced against the need of the Senate for information on which to base the exercise of its constitutional duty. The balance must be struck in such a way as to leave the nominee free to discuss leading Supreme Court cases such as Brown and Roe, without which an intelligent discussion of the fundamental problems of constitutional law is impossible; in such a way as to leave Senators with something more than resumes and slogans as a basis for their decision.

IV. An Illustrative History of Advice and Consent Hearings

> For the last two decades the confirmation hearings have evinced persistent Senate questioning of witnesses about their beliefs on stare decisis, specific past decisions of the Court, and their probable votes in certain types of potential cases. The senators who ask such questions have a simple position --- given the importance of the Supreme Court and a nominee's lifetime appointment, the Senate needs all relevant facts in order to make informed decisions. As Senator Ervin has stated, if the Senate "ought not to be permitted to find out what his attitude is toward the Constitution, or what his philosophy is," then "I don't see why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate. Just give them [the Executive] absolute power in the first place."[12]

The history of Senate confirmation hearings reveals a wide range of attitudes toward the proper scope of questioning, with the attitudes of Senators ranging from Senator Ervin's view to that expressed by Senator Hart, who in Justice Fortas's nomination to the Chief Justiceship urged his colleagues not to ask questions that went beyond the past written statements of the nominee.[13] Likewise the nominees have varied in their attitudes: Justice Minton refused to appear before the committee on the ground that "I might be required to express my views on highly controversial and litigious issues affecting the Court,"[14] whereas Justice Blackmun predicted that he would vote to uphold the death penalty except in cases where a state imposed it for a pedestrian crossing against a red light.[15]

The closest thing to an "official" position that has emerged from the hearings was a ruling made by Chairman Eastland during the Stewart hearings. Senator Hennings raised a point of order suggesting that it was improper to question the nominee on his "opinion as to any of the decisions or the reasoning upon decisions . . . heretofore . . . handed down by that court." Senator Eastland ruled that Senators could ask any questions they liked, but that the nominee was free to decline to answer any questions he thought improper. Senator Hennings withdrew his point of order after several Senators had indicated their support for the Eastland ruling.[16] Since the Eastland ruling seems only to state the obvious --- that no Senator will be prevented from asking any question he likes, and no attempt will be made to force a nominee to answer a question if he prefers not to --- it is of little value as authority on what questions and answers are proper.

The most common pattern in confirmation hearings at which nominees appeared personally was for the nominee to express reservations about discussing specific past Supreme Court cases, and to decline to answer some questions on this basis, but subsequently to answer others. The following exchanges are typical:

> Senator Ervin. . . . And if the Constitution means the things that were announced in the opinions handed down on May 20, 1968, why one of the smart judges who served on the Supreme Court during the preceding 178 years did not discover it?
>
> Justice Fortas. Senator, again, much as I would like to discuss this, I am inhibited from doing it. I respectfully note, if I may, sir, that the granddaddy of all these cases, in my judgment . . . was the famous Scottsboro case. It was in that case that Mr. Justice Sutherland said that the critical period in a criminal prosecution was from arraignment to trial --- arraignment to trial. I think that can fairly be characterized as dictum. But it was that statement that I think has been sort of the granddaddy of all this.
>
> Now here I have done something I should not have done. I am sorry, sir.[17]

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> Senator Mathias. . . . Now, I am wondering if, No. 1, you think these cases should be overruled?
>
> Mr. Powell. I would think perhaps, Senator Mathias, it would be unwise for me to answer that question directly. . . . Indeed on the facts in Escobido, I think, the Court decided the case, plainly correctly, but our concern was with respect to the scope of the opinion rather than with the precise decision.[18]

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> Mr. Rehnquist. Well, I certainly understand your

interest, Senator. The expression of a view of a nominee on the constitutionality of a measure pending in Congress, I feel the nominee simply cannot answer.

. . . .

Mr. Rehnquist. Let me answer it this way: To me, the question of Congress' authority to cut off the funds under the appropriation power of the first amendment is so clear that I have no hesitancy in saying so, because I do not regard that as a debatable constitutional question.

Mr. Rehnquist. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application based on new development in our society.

Senator Bayh. . . . Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?

Mr. Rehnquist. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.

My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board, type of decision. 19

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Just as some nominees expressed a narrow view of what questions they could properly answer and then tended to answer rather more questions than they had intended, others stated a relatively broad view and then answered fewer questions than their general statement seemed to justify. For instance, Justice Marshall repeatedly said that he was refusing to answer only those questions that he actually expected to come before the Court soon, not just those that might conceivably come before the Court, and he indicated his willingness "to discuss the fifth amendment and to look it up against the recent decisions of the Supreme Court," but he found reason to object to most specific questions.[20]

It should also be noted that some judges who refused to answer questions did so on a narrow ground. Brennan and Stewart had both received recess appointments, and declined to comment on cases on the grounds that they were sitting Justices.[21] Fortas, a sitting Justice during the hearings on his nomination to be Chief Justice, also declined on this ground.[22] Harlan observed that he realized the Senators had a problem, but that his record was well known and that the Senators should vote on the basis of what they knew about him.[23] Frankfurter, who also declined to answer specific questions,[24] also had a voluminous public record on a wide range of constitutional issues.

One issue that almost all nominees felt comfortable discussing was the doctrine of stare decisis. Although a nominee's views on stare decisis are at least as valuable an indicator of his votes on future cases as are his views on specific past Court decisions, no nominee objected to discussing the doctrine on the ground that it might prejudice his decision in some future case, and nominees including Brennan, Fortas, Marshall and Rehnquist discussed the doctrine and its application to constitutional law.[25]

Most of the questions and answers in confirmation hearings, however, have been in the unhelpful rhetorical mode. Nominees have assured the committee that they are strict constructionists who believe that the Court must "interpret the Constitution" and never "make law" or "amend the Constitution." Brennan, Marshall, Fortas and Blackmun are among these adherents of the intentions of the Framers.[26] Only Haynsworth and Carswell seemed to have any use for the "living Constitution."[27]

Finally, it is worth noting that at least one "single issue" dominated a number of the confirmation hearings. Race --- as a social and political issue and also as a constitutional matter --- was prominent in the Stewart, Haynsworth, Carswell and Rehnquist hearings.[28] Indeed, two of the three nominees rejected during this century, Carswell and John J. Parker, were defeated partly because of racist campaign speeches made during pre-judicial political careers.[29] The other issue on which Carswell was attacked was mediocrity,[30] while Parker, an outstanding judge, was attacked for the constitutional and political dimensions of a decision he had written upholding an injunction against violating a "yellow dog" anti-union contract.[31] Rehnquist was asked about his personal opposition some years earlier to a local open-housing ordinance and about his activities as a pollwatcher allegedly discouraging black persons from voting;[32] he and almost all nominees after 1954 were asked numerous questions about *Brown* and its progeny.[33] Thus if Judge O'Connor were asked about her voting record in the state legislature on abortion and related issues, about her position on *Roe v. Wade*, and about the relationship between her personal, political and constitutional views on the abortion issue, it would hardly be an unprecedented attempt to ferret out discrete elements of a nominee's "whole lifeview" and "sense, sharp or vague, of where justice lies in respect of the great questions of his time."[34]

[1] Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 657-58 (1970).

[2] *Id.* at 660.

[3] *Id.* at 663-64.

[4] Rehnquist, *The Making of a Supreme Court Justice*, Harvard Law Record, October 8, 1959, at 7,8.

[5] *Id.* at 10.

[6] *See, e.g.*, J. Harris, The Advice and Consent of the Senate 303, 313 (1953); Kutner, *Advice and Dissent: Due Process of the Senate*, 23 DePaul L. Rev. 658 (1974); Note, 10 Stanford L. Rev. 124, 143, 147, (1957)

[7] Hearings before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate, on S.158, The Human Life Bill, Thursday, May 21, 1981, at 111 (testimony of Professor Tribe).

[8] *Id.* at 114 (testimony of Professor Van Alstyne).

[9] Blackmun Hearings at 12.

[10] Fortas II Hearings at 105-06.

[11] Powe, *The Senate and the Court: Questioning a Nominee*, 54 Tex. L. Rev. 891, 893, 895.

[12] *Id.* at 891-92, quoting Stewart Hearings at 43-44.

[13] Fortas II Hearings at 123.

[14] 95 Cong. Rec. 13803 (1949).

[15] Blackmun Hearings at 60. Justice Blackmun was responding to a series of hypothetical questions posed by Senator Fong. In a separate statement in the committe report on the Blackmun nomination, Senator Robert Byrd (D.,W.Va.) recounted in detail how Senator Fong "commendably continued to elicit" the nominee's views on specific questions, and endorsed Blackmun's nomination because of his "strict constructionist" views. Blackmun Report at 12-13.

[16] Stewart Hearings at 41-60.

[17] Fortas II Hearings at 173.

[18] Powell Hearings at 231-32.

[19] Rehnquist Hearings at 33, 168-69.

[20] Marshall Hearings at 54-63.

[21] Brennan Hearings at 17-18; Stewart Hearings at 63. Justice Stewart had commented extensively on a number of Supreme Court decisions prior to this assertion of his right not to comment on such decisions. Id. at 11-62.

[22] Fortas II Hearings at 181.

[23] Harlan Hearings at 139.

[24] Frankfurter Hearings at 107-08.

[25] Brennan Hearings at 39-40; Fortas II Hearings at 110-15; Marshall Hearings at 156-157; Rehnquist Hearings at 138.

[26] Brennan Hearings at 40; Marshall Hearings at 54; Fortas II Hearings at 105-106; Blackmun Hearings at 74.

[27] Haynsworth Hearings at 75; Carswell Hearings at 62 ("The law is a movement, not a monument.").

[28] Stewart Hearings at 61-65; Haynsworth Hearings, passim; Carswell Hearings, passim; Rehnquist Hearings, passim.

[29] Carswell Hearings, passim; Parker Hearings, passim; Rehnquist, supra note 4, at 8.

[30] Carswell Hearings, passim.

[31] Parker Hearings, passim; Rehnquist, supra note 4, at 8-9.

[32] Rehnquist Hearings at 70-73.

[33] See, e.g., sources cited in note 28 supra.

[34] Black, supra note 1, at 657-58.

Senator EAST. Thank you, Mr. Chairman.

Mrs. O'Connor, I welcome you back again.

I bumped into you briefly a few moments ago over in the Senate building, and we are back in here again. It is a pleasure to be with you.

Time presses upon us. I would like, in the 15 minutes that I have, to commence by picking up a loose end we were talking about when time cut me off yesterday. If I might, please, I would just very briefly here review the bidding.

I had focused—it is true—upon this issue of abortion. It is of course an important public issue in its own right, but I think one could pick other issues dealing with race relations, rights of women, the death penalty, and so on and so forth, to allow us some way or other in microcosm to get at this question of judicial philosophy and basic personal values on fundamental issues of the day.

As I understood your position yesterday on this matter of abortion—you of course have repeated since then—you are personally opposed to it, except in extraordinary circumstances, as a general policy of birth control. You were negative on it, as I understood your position.

I then turned to the question of how one might approach it in dealing with it in the public arena as a matter of public policy. As I understood your position there, you said you thought it was very much a legislative type of function.

I do not wish to put words in your mouth. Please correct me if you think I am in error here. You thought it also might be looked on as a State function—at least historically it had been prior to *Roe* v. *Wade*.

I then turned to *Roe* v. *Wade* and asked you what you thought of this quotation from Justices White and Rehnquist in which they described the majority opinion as being an improvident and extravagant exercise of the power of judicial review.

On this matter of *Roe* v. *Wade* it is not only important because of the issue that it dealt with—namely, the abortion issue—but it is also probably the premier case that many offer in suggesting that the Supreme Court had gone way beyond any reasonable conception in its role as an interpreter and applier of the law. As is said here, it is just an improvident and extravagant exercise of the power of judicial review that is the legislative function.

In fact Justice Rehnquist in his own dissent said,

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose upon each one partakes more of judicial legislation than it does of the determination of the intent of the drafters of the fourteenth amendment

Just to put the question to you again, as I understand it you do not wish to comment upon Justice Rehnquist's observations on this case?

I think it is particularly intriguing because you and Justice Rehnquist of course were in law school together, as I understand it, and were classmates and I presume might even have had the same teachers for constitutional law. So it adds a bit of heightened interest to it.

Again if I might have your response to their observations on this case?

Judge O'CONNOR. Senator East, with all respect, it does seem inappropriate to me to either endorse or criticize a specific case or a specific opinion in a case handed down by those judges now sitting and in a matter which may well be revisited in the Court in the not too distant future. I have great reluctance to do that.

I recall the late Justice Harlan who at his confirmation hearing was asked, much as you have asked, questions about *Roe* v. *Wade*. He was asked his comments and reactions to the then-recent steel seizure cases.

His response was that if he were to comment upon cases which might come before him it would, "raise the gravest kind of question as to whether I was qualified to sit on that Court."

More recently the Chief Justice was asked to comment on a Supreme Court redistricting decision which was subject then to a great deal of criticism by some Senators. The Chief Justice noted that:

> I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the Court on which I now sit or on any other Court on which I may sit.

These are things that have concerned others before me and concern me now.

Senator EAST. I was noting earlier though, for example, your willingness in response to a question from Senator Metzenbaum about *Baker* v. *Carr*. You said that you were concerned about that case at that time, which I gather meant you had reservations about it.

I might for example inquire: Were you concerned about *Roe* v. *Wade* at that time?

Is there a tendency here to be selective in terms of which cases or doctrines you will or will not comment on; or, I guess, quite specifically, is the reluctance particularly applicable to *Roe* v. *Wade* and the abortion issue?

Judge O'CONNOR. Senator East, I am trying not to be selective in those matters to which I am willing to react, if you will. Certain things have been rather well decided and are not likely to be coming back before the Court directly or in any closely related form on the merits, if you will. With that situation my observation in the prior transcripts is that there is not the same reluctance expressed.

I felt it was a little unlikely, I suppose, that the Court was going to retreat or reconsider the basic precepts behind *Baker* v. *Carr*.

ADVISE AND CONSENT

Senator EAST. Of course the reapportionment issue, as the death penalty issue, as the rights of minorities issue, as the rights of women's issue, as the question of abortion—these things—I am simply probing—do they not constantly recur?

Let me restate it. If you are arguing that a prospective Supreme Court nominee cannot indicate particular values or sentiments on prominent issues of the time—if I might shift the focus of this to the whole problem of the Constitution and separation of power—it seems to me the confirmation process becomes almost meaningless; it simply means it is reduced to ceremony and résumés.

I do not, for heavens' sakes, wish this to be understood in terms of any personal reflection upon you because you have done an outstanding job. I am concerned as a Senator, as I look at the concept of separation of power, where we are supposed to be a part of this process of appointment to the Supreme Court. The President nominates, and we are supposed to advise and consent.

If in our fulfilling that obligation which the framers gave to us we are forbidden to get real substantive comment on issues of consequence—for example, previous doctrines and cases—I dare say we set a precedent—potentially, do we not?—whereby we cannot really fulfill any meaningful constitutional obligation; hence, we might suspense with it.

It is frustrating, as a Senator, because the Senate and the Congress are trying, I feel, in so many ways to reassert their policymaking function which many feel has been eclipsed by the bureaucracy under the direction of the executive branch or frequently by the Supreme Court and the judiciary.

We are given a few tools in the Constitution to try to assert our check and balance in separation of power. One of those is to be a part of the confirmation process. We have clearly that check or balance under the Constitution, but if we are forbidden by our own practices or those insisted upon by nominees, I query whether that formal and fundamental check and balance—and probably the most fundamental one we have in the appointment process—is not negated and eliminated simply because questions cannot be asked in a fairly thorough and substantive way.

I can appreciate you cannot promise anything; I can appreciate you could not comment upon pending cases; but when we are told that there cannot be comment upon previous cases and previous doctrines of substance, I query as one lowly freshman Senator whether we are able really to get our teeth into anything.

We are setting a precedent here. It has been noted that half of us have never been in on this process before, and you are probably the first of a number we are going to have coming up down the road with President Reagan.

I would hope that the Senate and the Judiciary Committee would set the precedent for confirmations of substance and depth and meaning.

You have certainly been an outstanding witness; there is no question about that. I probe it not in a personal way; I probe it in a constitutional sense as to whether we the Senators are really going to be in a position to make a substantive judgment.

I appreciate your candor in *Roe* v. *Wade*, and I certainly respect your judgment and your unwillingness to pursue it in greater depth. I do not wish to belabor the obvious, and so I will let the issue of *Roe* v. *Wade* rest because you have clearly indicated your reluctance to get into the specifics of it.

If I might please, Mrs. O'Connor, let me shift to one other point—time moves on—a different area beyond *Roe* v. *Wade*, but it relates to the check and balance that the Congress has upon the Supreme Court and the Federal judiciary. This is the question that Senator Specter so properly raised this morning on the question of jurisdiction under article 3.

Under article 3 of the Constitution, as you are well aware, there is the language dealing with this question of the appellate jurisdiction of the U.S. Supreme Court.

We are told that, "the Supreme Court shall have appellate jurisdiction both as to law and to fact with such exceptions and under such regulations as the Congress shall make." That is very explicit language to me, indicating that we do have that check or balance to set the limits, great or small, of the Supreme Court's appellate jurisdiction. You were noting that article 3.

Then the question was: Do we have any Supreme Court precedent on it? You noted ex parte *McCardle.*

I was interested in your comment. You said, "This is all we have; we don't have much to look at."

I would query, Mrs. O'Connor. We have an express provision in the Constitution. We have a Supreme Court decision that expressly upholds it. I would say that is a great deal to look at. That is about as convincing as one might make the case if stare decisis, precedent, and express language mean anything.

Am I correct in understanding your position that this is a very open, clouded issue whether the Congress has the power to deal with the question of the appellate jurisdiction of the U.S. Supreme Court? Do you think that is very much an up-in-the-air question?

Judge O'Connor. Senator East, only in the sense that we do not have experience as yet in the area of the Congress having actually passed legislation which becomes law and which says, for instance, the U.S. Supreme Court shall have no further jurisdiction over any question relating to, let us say, busing of schoolchildren. We have not had that kind of legislation enacted, and therefore no test, if you will, of the validity of that.

When I said that it was an open question I think I referred to the fact that a number of constitutional scholars have written articles on that very question simply because there are so many proposals now pending in the Congress to limit the appellate jurisdiction of the Supreme Court and also jurisdiction of the lower Federal courts in a variety of areas. So the subject has become one of interest.

I did point out that some believe that ex parte *McCardle* was perhaps not the complete answer to all questions which might potentially arise without power to be exercised in some fashion by the Congress. So I suppose in that sense we would logically expect that such an enactment could be questioned.

Ex parte *McCardle* is the case which was decided on a specific enactment of Congress repealing appellate court jurisdiction of the Supreme Court in that instance of any habeas corpus holdings of the lower courts. That simply is all that we have on that area.

If I might go back to your previous question for one moment to make one comment I would appreciate it. That is, in trying to draw the line on past cases where you feel comfortable in making comments as a nominee and those which you do not, I am simply aware in this instance that there are a number of people who have urged and continue to urge that the *Roe* v. *Wade* case—those who believe it was incorrectly decided who urge that the matter should be brought back before the Court at the earlier date and the Court should be asked to consider again that question or questions related closely to it.

I think that it does fall in a category for that reason of concern as opposed to those cases where we are not hearing that kind of an approach.

Senator EAST. Mrs. O'Connor, on that point, every fundamental constitutional question is never fully resolved; it is always recurring, in whatever field it is. I see what you are saying, and I respect your judgment on it. I just respectfully disagree in that questions are always recurring, being reexamined, and redefined.

I do not see anything that is unique about this one as opposed to the others because they too shall be coming back, and I suspect this one will be coming back for an indefinite period of time.

But, again, I thank you for your courtesy and responsiveness. Mr. Chairman, I have run out my time.

The CHAIRMAN. The distinguished Senator from Montana, Mr. Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Judge O'Connor, I think it would be helpful if we pursued the same issue a little further.

It is my understanding that subsequent to the *McCardle* case the *Kline* case was decided which held that the Congress cannot limit Supreme Court jurisdiction in order to achieve a certain result.

Not only are there various constitutional scholars who come down on different sides, but the case law here is a bit confused, too. Is that not the case?

Judge O'CONNOR. Senator Baucus, you are correct. I think approximately 4 years after ex parte *McCardle* we had the case in 1872 of *United States* v. *Kline.*

I believe—I am not certain—that case involved a removal of jurisdiction at a lower Federal court level and was not directly related to the appellate jurisdiction of the U.S. Supreme Court. I could be wrong, but that is my recollection.

The case involved a matter which was then pending involving a litigant in the lower Federal court who had obtained a Presidential pardon for disloyalty in the Civil War, and he had a claim which was being made which he was entitled to make based on the Presidential pardon.

The Congress passed a law which in effect directed the court to dismiss the lawsuit of any person who had obtained a Presidential pardon for disloyalty in the Civil War. It was directed of course at that precise lawsuit, and the Supreme Court did hold that that action by Congress, which was directed toward resolving a particular case, was invalid.

Senator BAUCUS. Yesterday when we discussed this same issue I asked you as a matter of public policy how far you felt Congress should go in limiting Supreme Court review of constitutional questions. You appropriately did not give a definitive answer to that question.

Nevertheless, I was left with the impression that you had certain problems with limiting Supreme Court jurisdiction because you cited a vote that you had cast in the Arizona Senate on a related issue.

I would like to quote from the minutes of the Arizona State Senate, which quote you, after your vote in opposition to Senate Memorial No. 1. This was on February 25, 1970. It substantiates the point you made to me yesterday.

I quote—this is you:

> The issue is whether we want to advocate stripping the supreme court of jurisdiction over certain matters because we disagree with some of its decisions. I too disagree with certain United States Supreme Court decisions in the field of pornography and obscenity, but I cannot advocate limiting the Court's appellate jurisdiction. Once we start such a procedure, where do we stop?

My question is whether you still subscribe to that view.

Judge O'CONNOR. Senator Baucus, I was of course speaking as a legislator in 1970, and I do not want to be put in the position of suggesting to other legislators how they should view the situation today.

But that certainly was my expression at that time in regard to the proposal that was before us. I do not think that I would have retreated from that position thereafter as a legislator.

SPECIALTY COURTS

Senator BAUCUS. Turning to another area, because our country is getting more complex, some have suggested that we create specialty courts, particularly specialty courts of appeal—a tax court of appeals for example; some have suggested an environmental court of appeals.

My question to you is what is your general view of the degree to which Congress should set up specialty courts of appeals as opposed to letting the circuit courts of appeals and the Supreme Court handle complicated and arcane issues as generalist judges.

Judge O'CONNOR. Senator Baucus, Senator DeConcini was really addressing some of the same questions with me this afternoon.

I do not know that I have a clear picture in my own mind of precisely how such courts would work. I think the Congress is now in a position to evaluate the bankruptcy court structure that it has established—and that certainly is a specialty court in a sense—and can determine whether the enhanced jurisdiction that has been given to that bankruptcy court will work well in that specialized area. If it does and if people generally are satisfied, then perhaps it can be considered in some other areas.

Senator BAUCUS. I am wondering though, as an appellate court judge, what guidance you might give us. Do you think it is good public policy to move in the direction of setting up specialized courts; or is it better public policy for appellate court judges as generalists to hear cases arising from different directions?

Judge O'CONNOR. Senator Baucus, as an appellate court judge, I have personally valued the opportunity to deal with a wide range of cases and issues. I have been happier in my work, if you will, just as a personal matter, to have the opportunity to deal with a broader range of issues.

What we really want to know is what best serves the public generally—what is going to make the court system work best and not what pleases the appellate court judges.

Senator BAUCUS. That is correct.

Judge O'CONNOR. In that regard I think we have to develop a little experience before we can say that it is appropriate to go off in a certain area.

It is conceivable to me that in some areas they are so completely specialized that it is not totally inappropriate to at least consider it—conceivably in the tax or patent area, for example—but do we need ultimately some avenue back into the general court system for some final review from that specialized first treatment? These are the questions that need to be evaluated, I think.

REDUCTION OF VIOLENT CRIME

Senator BAUCUS. As you know, this committee and the Congress have been asked by the President to take up a major crime package. On that agenda are many items including the death penalty, sentencing reform, bail reform, preventive detention, elimination of the exclusionary rule, and a massive program to build more prisons.

Based upon your experience as a jurist, a legislator, a mother, or as a citizen, tell us how you think we should go about addressing the problem of violent crime. In which of these areas do you think we should spend most of our time and attention?

How much do you think we should devote resources to rehabilitation? Or is that passé? Should we spend time on enacting tougher longer sentences?

I am just curious as to what your general philosophy is toward violent crime and how we reduce violent crime.

Judge O'CONNOR. Senator Baucus, I wish I had a ready and an easy answer, because I think the problem is of enormous significance to us as a people and as a nation. I think it is of grave concern to our citizens, and certainly it is to me.

My experience with the criminal justice system has resulted in some disappointments in the lack of effectiveness; the recidivism rate is extremely high, and the crime rate generally is extremely high. We have to ask why.

It is a question that I have asked myself many times, and I think it is partially a result and factor of a general breakdown, if you will, of the standards that we apply in our society to moral behavior. I truly believe that.

Whether there is some legislative remedy to that I question. It is a matter that has to concern every one of us, and we have to attempt in every way we can to set standards that will discourage criminal behavior.

It seems to me that we are a mobile society, we are no longer a rural society, and we live big cities, our neighbors do not know us, and we do not know our neighbors. We do not have extended families living together, and so the pressure that comes from peer pressure, if you will, to behave in certain acceptable ways no longer exists for most people in our Nation. I think these things contribute, frankly, to the crime problem.

I also believe that our ready access, at least in the Southwest, to the drug traffic has contributed heavily to the crime problem in those Western States. It has been a very serious matter, and if there were some way to spend a little more effort and control in the problem of traffic in heavy narcotic drugs I think it would be time and effort well spent.

If there is a way to provide more prison space, it is evident that there is a great need for that at both the State and the Federal level. We simply have more population, we have high crime rates, we have people who are being sentenced, and there is no space for them.

In Arizona, for example, we have a State prison sentence that the legislature has devised as a sentencing structure that was intended to be very specific for the judges. Certain crimes would have certain fixed sentences imposed.

We are so short of prison space in Arizona that a 5-year sentence that is imposed by the judge might result in a release within 3 months because there is no room at the prison. That kind of system is not effective.

So there are many means, and I think we need to approach them on a broad front. I wish I had some easy answers, but I do not think I do.

Senator BAUCUS. Frankly, I commend you on your answer because I think it is very complex and there is no simple solution. For example, I think that the building of prisons or lengthening of sentences alone is not the answer. It is a very complicated problem.

It reminds me of something that H. L. Mencken once said, "For every complicated problem there is a simple solution, and it's usually wrong." We have to exercise every effort at our command to try to resolve it, but it is going to be a complicated and a very difficult effort.

As a westerner I know you are very aware of some of the resource conflicts that are emerging in our country. The West has a lot of coal; oil and gas development is a potentially promising source of energy for our country; oil shale is developing in the West.

As I am sure you know, the Western States also are trying to protect their own resources. They have enacted severance taxes to compensate for the costs of development, including the disruptions and dislocations that might occur in those States.

As energy becomes more desired in our country, there is a greater potential for more conflict between Eastern States and Western States—the producing States in the West and the consuming States in the East.

I am curious as to how you see the tension resolving itself and the degree to which you think the 10th amendment will have any meaning as these cases arise.

The Supreme Court, as you may know, not too long ago held that Montana, for example, properly imposed a severance tax on coal that is mined in the State of Montana. The court held that the commerce clause did not prevent the State from imposing such a tax.

How do you see the Federal-State tensions moving, and what guidance would you give us in trying to help resolve that?

Judge O'CONNOR. Senator Baucus, I do not think I can give the Congress any particular guidance in that area. These are matters as far as the Congress is concerned that affect very directly the

State and Federal relationship. So these issues will be debated fully here and explored from a policy standpoint.

With regard to the 10th amendment, to the extent that the regulations I suppose are directed or the Federal statutes, if you will, are directed toward the activities of private business as opposed to the activities of the States as States, the most recent pronouncements indicate that the 10th amendment would not be considered as a bar.

So I do not know that we can look to that for guidance in the extent to which the Federal Government is properly regulating activity of private business within the States in this developing field.

Senator BAUCUS. I guess my question really is what you see in the Constitution that enables States to control the development of their own resources as opposed to provisions in the Constitution which allow the Congress to limit State control over resource development. Unfortunately my time is up, so we cannot pursue this any longer.

I want to close, though, by saying that this is probably the last time you and I are going to have to chat publicly over these matters. I think you have been an excellent witness.

There is a possibility that you may reappear later after the other witnesses. That has not been finally determined, but in all probability you will not return.

I frankly want to praise you and tell you that I think you have done very, very well. I wish we had more opportunity to discuss more substantively some of the issues that are coming before the Court.

I understand your reluctance to get into some of these matters in great detail. I agree that you should not discuss them publicly more than you have. Your restraint in addressing these questions has caused my admiration for you to increase rather than decrease.

Further, I think it is in large respect your personal views on substantive issues is less important than your competence and your integrity. You have certainly demonstrated the highest integrity and the highest competence in your testimony before us.

I just want to wish you the very best of luck. You are going to have to bear heavy responsibility on the Court. In many ways I envy you. We all send our best wishes with you. Thank you.

Judge O'CONNOR. Thank you very much, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Judge O'Connor, since I tend to look so serious whenever I ask questions I would like to spend just a few minutes being philosophical and commenting in much the same vein as my predecessor, Senator Baucus, has just done.

This may be the last time you and I will have conversations unless, for instance, you would be nominated for Chief Justice some day and come back before the committee.

As I think about the things that I would hope for you, I have to think about the first thing you said to me when we met privately in my office. I was very relieved to have you say it and open up the conversation in that way. You said something to me like, "And you're a farmer, too." You then went into a discussion of your background, having obviously done your homework about what Chuck Grassley was all about.

That did not mean so much at the time, until I was later visiting with somebody in my home State who said things that were complimentary about you. Although the way I repeat them they may not come out that way, they are intended to be complimentary.

As he was trying to explore with me whether or not you ought to be confirmed—and it was his opinion you should be—he too had read something about your rural background, and that you had worked your way through the legal system and the political system to become what you are today.

He looked upon your appointment as a breath of fresh air. His understanding of your background had a great deal to do with his looking sympathetically and approvingly at your nomination.

I think the implication was that here you are, a person who has been successful, you have come from a rural State with a rural background, and people who have that sort of background cannot be all bad—in fact, your having a rural background could bring a dimension to the Supreme Court that was refreshing to him.

I put together what he said with what you first said to me, and realized that there is something very personal about you, brought out in meetings like this, that cannot help but impress us very much.

I say this now because I am always one to ask questions, never having time at the end of a 15-minute interval for these kinds of comments.

At any rate, this is the way that I have looked at you in the 6 weeks or 2 months that I have had an opportunity to know about you and read about you.

LEGISLATIVE VETO

Now I would like to ask you a question that would follow up on what I believe Senator Dole brought up. He was getting into a philosphical discussion with you about whether or not administrative agencies had been delegated too much power by the Congress and the extent to which that delegation ought to be reviewed, and further controlled by Congress.

I would like to ask you somewhat the same question that I asked you in our private conversations in my office—how you look at the whole subject of congressional veto or whatever terminology you might want to use—the whole process by which Congress could have some sort of check on the administrative agencies as a follow-up of the delegation of legislative authority, and not as a congressional control over administrative decisions that are constitutionally within the realm of the President. I think that that is a differentiation that we must make.

I would like to have your opinion on congressional control or review over the delegation of a legislative authority.

Judge O'CONNOR. Senator Grassley, I know that that is a topic of great interest presently in the Congress. Several proposals are being made for a legislative veto in one form or another.

These proposals are being aired in various forms at the State level also. I understand they have actually been adopted in a number of States in one form or another.

I had no experience in Arizona with a legislative veto, if you will, because during my years there no such proposal was adopted. So I have had no personal experience at all with it.

As it has been discussed and considered in the Congress some have expressed concern about the separation of powers concept and the extent to which Congress should have veto power, if you will, over administrative agency regulations after those regulations have been adopted.

These are really unanswered questions in two ways: One, the Congress has not adopted such a provision yet really; and, two, the courts have not had a chance to review them in respect to the allegation of separation of powers.

It strikes me that Congress has a very effective power irrespective of any legislative veto provision that it might want to adopt, and that is the power to take a look at the administrative regulations which the particular agency has adopted, and if Congress feels that that agency has gone beyond the scope of the intended authority of Congress, Congress has the power to directly legislate in such a fashion as to make clear that it was not intended to have that power and to effectively by direct enactment curtail that kind of power. So I assume that that is a very direct means which Congress can also use.

Senator **GRASSLEY**. That would not be included in one of the instruments though because that is just a natural response and obviously a constitutional response.

Judge **O'CONNOR**. Yes.

Senator **GRASSLEY**. Legislation amending existing statutes would be the sort of instrument—and I use that term very generally—that would be considered and is being considered by the Congress.

How would you view something beyond what we know and understand we can do presently under the Constitution?

Judge **O'CONNOR**. Senator Grassley, I wish I could give you a more definitive response, but my experience with it is limited, and I do not believe the court has had a chance to rule on it, so I cannot speak from that viewpoint.

I assume that a lot of questions are being addressed by the Congress as they consider these proposals. For instance, if the reviewing body is less than the entire body of Congress; if it is confined for instance to a designated group within one branch—either the Senate or the House—then you run into questions of bicamerality.

Senator **GRASSLEY**. That is true.

Judge **O'CONNOR**. If it is less than a whole body, what do you do with that?

Senator **GRASSLEY**. You do not need to go into those details. Maybe I can make it easier for you by asking if there is anything in the concept that you find abhorrent to you personally from your legal experience, from your being a legislator, or as you have an understanding of the Constitution today.

Judge **O'CONNOR**. Senator Grassley, I would only say that there may be basic issues of separation of powers involved in a particular enactment, but I would certainly want to look at the particular enactment that was produced before formulating any conclusion and would also want to have the benefit of briefs, arguments, and discussion.

Senator GRASSLEY. On another point—and this again has been asked by one or two other Members but not quite in the way that I am asking it—the Court has recently required that the plaintiffs in civil rights litigation specifically demonstrate how it is they have been discriminated against before the burden of proof shifts to the defendants.

Previously the plaintiff was only required to make the allegation of discrimination and then the defendant had to rebut that allegation.

Would you favor placing a stricter burden on the plaintiff?

Judge O'CONNOR. Senator Grassley, I do not know that I have reviewed the decision adequately enough to know precisely what standards are being employed.

I would look initially I think at the statutory provision involved—if it is a proceeding under title 7, title 6, or whatever it is—and determine the intent as expressed by Congress in reviewing such a matter. Then I would certainly want to look at the precedent established in the cases.

If the precedent is established as you say quite firmly with respect to that provision, then that would of course be very significant.

Senator GRASSLEY. Again there has been reference made by several members of the committee to the recent Law Review article that you wrote from the perspective of a State court judge.

In my reading of that, as I had done previous to my private meeting with you, I got the impression that you would look favorably upon returning to the State court exclusive jurisdiction in some matters which involve Federal constitutional questions.

Is my impression correct, and over what matters do you believe only State court review is necessary?

Judge O'CONNOR. Senator Grassley, I do not think I ever expressed the view that State jurisdiction should be exclusive on Federal questions. Indeed it cannot be under our constitutional system. But I did feel that there are many instances in which a full and fair hearing of a Federal issue can be had at the State level.

In those instances perhaps we already have seen indications that when that is the case perhaps the Federal courts will decline the granting of a further review other than a review to determine whether there was a full and fair hearing granted at the State level. Those types of trends seem to me to be healthy.

Senator GRASSLEY. That was obviously written during your present position on the court of appeals. How do you view your consideration of that article and specifically this point now that you are being considered for the Supreme Court?

Judge O'CONNOR. Senator Grassley, that remains to be seen. I was asked that question, I think, by someone when I spoke at the seminar and was asked, "Well, I wonder after years of experience on a Federal bench if you would view the thing in the same light?"

I can only say to you that if given that opportunity I would be happy to report back. [Laughter.]

Senator **Grassley**. Do you feel your attitude toward the State court system has been affected by the fact that you became a State court of appeals judge after having been a State trial judge?

Judge O'**Connor**. Senator Grassley, I do not think that it altered my perceptions of the capacity of the State court system to consider certain questions. I would say it reinforced those views.

Senator **Grassley**. Mr. Chairman, I yield back the remainder of my time.

The **Chairman**. Thank you.

Senator Denton is next. He had to go to the White House, and so we have agreed on account of that emergency for him to question in the morning on his second go-round.

Senator Specter, we have now reached you.

LENGTHY COURT DELAYS

Senator **Specter**. Thank you, Mr. Chairman.

Judge O'Connor, in light of the hardship on litigants occasioned by lengthy court delays do you believe it would be useful to limit the time that appellate courts could take to decide cases, along the lines of the Federal Speedy Trial Act for criminal cases?

Judge O'**Connor**. Senator Specter, that is a difficult question in a sense. I am extremely concerned about the length of time that it takes to get civil litigation concluded.

Certainly at the appellate level some cases require a great deal more work and study than others. At the appellate level some cases take longer time within which to gain a consensus than do others. This is a natural part of the process, and so a time limit that would be quite suitable for a run-of-the-mill case for which there are no unusual difficulties and no unusual disagreement among the Justices would not pose particular problems. On the other hand, some other cases could pose problems.

State legislatures have occasionally addressed this problem. Indeed, the legislature in Arizona has and has mandated that judges may not receive their paychecks unless work is completed within a certain amount of time, granted certain exceptions however at the appellate level.

Senator **Specter**. What is the result then of withholding pay?

Judge O'**Connor**. I do not recall any checks having been withheld. Whether that is because the work is done or it is not being enforced I could not tell you.

Senator **Specter**. Is there any realistic way that the Congress could act to limit the courts from writing such long opinions?

Judge O'**Connor**. Senator Specter, I wish there were. I think that we can do a good job in general with less verbiage. At least that is my belief. It is my hope that I would be able to do that. Time will tell.

Senator **Specter**. In dealing with the complexities of the cases, the Supreme Court limits the length of briefs and limits the time for litigants to make their arguments. Why would it not be equally possible to limit the length of court opinions or the length of time that the courts could spend? They deal with the same case in terms of complexity.

Judge O'CONNOR. Senator Specter, I am sure that we would hear if we were to consult with others the fact that some cases require more words to explain than others, some issues are more complex, in some cases the court has to address more issues which have been raised by the litigant, and it obviously takes more words and more paper to do that.

Just speaking in broad generalities, I tend to favor, if you will, brevity but not at the expense of clarity or not at the expense of a failure to analyze or expound on the necessary issues. That is terribly critical.

I am sure litigants would rather have an extra page of paper, if that is what it took, to deal with a specific issue than to have some arbitrary limit on the length.

But just speaking in general terms, I think brevity can be a virtue and dealing with matters expeditiously is clearly a virtue.

Senator SPECTER. Our research has shown that you have not written any dissenting or concurring opinions. Is that accurate?

Judge O'CONNOR. No; Senator Specter, it is not. In the sense of the published opinions it is possible that that is the case, but I have participated on my panels in the court of appeals in many cases, and there have been at least some occasions in which there has been a dissent or a concurring expression by me. Whether it was in a memo decision or decisions I am not sure.

MULTIPLE OFFENDER STATUTES

Senator SPECTER. Judge O'Connor, do you think it wise, as many States have done under multiple offender statutes, to give the trial judge the discretion to impose a life sentence on a person convicted of four major felonies such as robbery, rape, burglary, arson, or drug selling?

Judge O'CONNOR. Do I think that is an appropriate sentence possibility?

Senator SPECTER. Yes; do you think it is wise to give a trial judge the discretion to impose a life sentence for the so-called career criminal defined under many multiple offender statutes as a person who has committed three or perhaps four major felonies among the ones I enumerated?

Judge O'CONNOR. Senator Specter, without expressing any opinion on the eighth amendment implications, if any, I am generally in favor of giving trial judges discretion to impose lengthy sentences if necessary, including up to life sentences, for repeat offenders. That concept seems to me to be generally a valid one.

It has been my observation that a life sentence can be a lot shorter in actuality than a lengthy term of years. Be that as it may, I think discretion is appropriate.

MANDATORY LIFE SENTENCE

Senator SPECTER. When I asked you this morning about the death penalty you commented in addition that you were opposed to mandatory sentences. What would your objection be, if any, to having a mandatory sentence of life in jail for someone who is established as a career criminal—a repeater of violent crimes—by a standard of having committed three or four major felonies such as rape, robbery, burglary, or drug sales?

Judge O'CONNOR. Senator Specter, this morning in response to your question on the mandatory sentence I indicated that I had voted against a mandatory death penalty statute in Arizona; and that was not intended by me to be an expression of the view that I am opposed to a legislative body mandating certain narrow ranges of sentence for all other crimes. I did not really address that subject, and you now are.

I think that certainly the legislature has a prerogative—a very great prerogative—in the area of determining the range or appropriate sentence for criminal behavior. In fact, I can think of no more frequently exercised topic of discussion and action for State legislative bodies than in that very area.

It is not inappropriate in my view that a legislative body might determine that there are certain very closely defined limits for sentencing of repeat offenders.

Senator SPECTER. Do you agree with the feelings of many of us who have been active in law enforcement that as a generalization judges do not impose sufficiently long sentences for violent criminal repeaters?

Judge O'CONNOR. Senator Specter, it is hard to generalize on that. There is no doubt that the criticism perhaps can be made of some judges with some sentencing patterns.

The public has often been dismayed at the sentencing habits of individual judges. These are very individualized matters, of course, because each defendant in being dealt with by the court at the time of sentencing presents a different set of circumstances as to background, age, and circumstances of the offense, and so forth. It is a very individualized matter.

The expression of the public sentiment and disappointment about judges' sentencing patterns has resulted in some States, such as Arizona, in the adoption of an entirely new sentencing structure in Arizona and in the production of an entirely revised criminal code. The result of that effort was to closely restrict the discretion of judges in sentencing.

To an extent, that effort of the legislature has been frustrated in large measure by the fact that there is not prison space and that the sentences that are mandated and handed down are not served.

So it has been, I am sure, a continuing frustration both to the citizens and the legislators.

FEDERAL AND STATE JUDGE SALARIES

Senator SPECTER. Judge O'Connor, do you believe that there is a real danger to the quality of the Federal bench posed by resignations because of low pay?

Judge O'CONNOR. Senator Specter, this has occurred of course. It has occurred at the Federal level—I have read of instances—and it has occurred at the State level. I am aware of a number of those instances.

I may say that the pay of State judges generally is substantially lower on the average than that of the Federal judges. So if there is a problem at the Federal level it is even more acute at the State level, and it is and should be a matter of concern to people generally to see that judges receive adequate salaries in my view, sufficient to attract competent people to the bench and hold them.

Senator SPECTER. In a day with so many very deep Federal cuts in so many programs—social programs and perhaps now defense—is it appropriate to raise Federal judges' salaries to offset a significant threat being posed to an inadequate Federal judiciary by current wage levels? This is a question consistently before the Congress.

Judge O'CONNOR. Senator Specter, it seems to me that the Congress has to consider seriously the plight of all officers and employees who are serving at fixed salaries in a period of heavy inflation. It seems to me that that is absolutely crucial that those factors be considered in determining what is appropriate.

Senator SPECTER. Are you familiar with the Supreme Court decision, *United States* v. *Will*?

Judge O'CONNOR. That is the salary case, Senator Specter?

Senator SPECTER. Yes.

Judge O'CONNOR. Yes—generally I am.

Senator SPECTER. That case posed a situation where for four pay periods the U.S. Supreme Court decided, in favor of judges, to raise the compensation for Associate Justices from $72,000 to $88,700, circumventing what is customarily the congressional prerogative to establish compensation for Federal judges and did so on the very narrow ground that where cost-of-living adjustments had been passed by the Congress and in 1 year the President acted to rescind it on September 30, and in another year the President acted to rescind it on the morning of October 1. The Supreme Court of the United States said that where the year had started and the cost-of-living adjustment had gone into effect rescinding it would be a violation of the constitutional prohibition against diminishing the salary of a judge in a term of office.

I think there are many of us who felt that whatever case there was to be made for increases in compensation, including Federal judges, it was a matter that ought to come through the Congress, as with all other Federal employees, as opposed to having the U.S. Supreme Court itself take the bull by the horns, so to speak, and give themselves that kind of a pay raise.

I think that is a case which is not likely to come back, at least in that form, so perhaps that is one where I might appropriately ask if you agree with that specific decision.

Judge O'CONNOR. Senator Specter, I frankly did not study that decision at all. It was not of that great a concern to me because I little expected that I might some day be sitting on that court.

Senator SPECTER. Well, the case may have some extra significance soon.

There has been a fair amount of comment about the desirability of letting the public have a greater understanding of the work of the U.S. Supreme Court, and there has been a popular book written recently, "The Brethren", which perhaps had as sources of information disclosures by employees of the Supreme Court Justices.

Would you consider restricting in anyway your law clerks, your secretaries, or anyone under your direct control from making any such disclosures to journalists?

Judge O'CONNOR. Senator Specter, I do not know whether I would or not. I certainly would instruct employees that they must maintain the strictest confidence concerning pending matters before the Court. That seems to me absolutely crucial and vital. I think little is to be gained by anything less than a very firm policy in that regard.

No doubt other matters such as personalities or the general way in which the business of the Court is conducted are matters which will always be discussed to an extent by those who have knowledge of those aspects.

DIVERSITY IN SUPREME COURT APPOINTMENT

Senator SPECTER. Let me skip quite a number of questions since my time is almost up and ask you one final question, Judge O'Connor. Do you think there is any basis at all for appointing a Supreme Court Justice with a view to diversity on account of sex, race, religion, or geography; or would you think it preferable to appoint the nine most qualified people that could be found for the job, even if they all came from Stanford in the same year and lived in Arizona?

Judge O'CONNOR. Senator Specter, that would undoubtedly guarantee quality if that were to be the case.

[Laughter.]

Senator SPECTER. It might also, in the process, eliminate the potential conflict of interest issue which was raised by Senator Biden with respect to Mr. O'Connor.

Judge O'CONNOR. Very possibly.

Senator SPECTER. Do you think though that there is any realistic basis to look for diversity—more than one woman; perpetuating, if I may say, a black seat on the Supreme Court; or seeking geographical balance in the appointments to the Court?

Judge O'CONNOR. Senator, I think the Court traditionally has reflected some effort to achieve diversity. Anyone who is skilled in the political arena knows that it is often desirable for political reasons to see that diversity in any given body in which the appointment process is being exercised reflect a certain amount of diversity. I would expect the political process to always take that into account to some extent.

At the same time, I think it is quite possible, even though one might want to have diversity, whether it is of geography, race, or sex, to all select people of competence, ability, and quality, because I think people of that capacity abound in all races, in both sexes, and in all parts of the country.

Senator SPECTER. Judge O'Connor, I started this morning by complimenting you on your tour de force of yesterday and I would add to that my compliment for today.

In the interest of hearing the balance of the witnesses who will be coming forward I will refrain from making any commitment as to my own vote, but that is the only reason.

Judge O'CONNOR. Thank you.

Senator **Specter**. Thank you very much, Mr. Chairman.

The **Chairman**. I have a letter addressed to me as chairman of the Judiciary Committee, from Congressman Bob Stump of Arizona. It is a very complimentary letter about you, Judge O'Connor. Without objection, we will place this in the record.

Judge **O'Connor**. Thank you, Mr. Chairman.

[Material follows:]

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ARMED SERVICES COMMITTEE

PERMANENT SELECT
COMMITTEE ON INTELLIGENCE

VETERANS' AFFAIRS
COMMITTEE

September 9, 1981

Senator Strom Thurmond
Chairman, Judiciary Committee
2226 Dirksen Building
Washington, D.C. 20515

Dear Mr. Chairman:

It is my pleasure to recommend to you Judge Sandra O'Connor, of the Arizona Court of Appeals, for confirmation as a Justice of the United States Supreme Court. She is emminently qualified for that position, both through intellect and disposition.

Judge O'Connor and I served together in the Arizona State Senate on opposite sides of the aisle. At one point, she was majority leader while I was minority leader. Perhaps adversaries have the best opportunity to appraise their opponents. Based on that experience, I can make the following observations.

She has a consistent and coherent conservative philosophy of government and of law. Her decisions are grounded in principle and her approach is precise, with attention to detail. The effect is that those who deal with her know where she stands.

She is fair. The power of the majority can tempt some to take unfair advantage of their adversaries. As majority leader Judge O'Connor did not abuse that power. We were given the greatest possible latitude for making our case on any issue. The result was that all parties got a fair hearing in debate. I believe the quality of the laws enacted was improved.

Her attention to the details of statute drafting was such that no point of grammar or punctuation was too small to consider. She understood that failure to attend to such details often resulted in statutes that lacked clarity. She knew that imprecise statutes often lead Courts to substitute their policy judgement for that of the legislature. She believes very strongly that the legislature is the proper forum for policy debate and determination. Her sense of responsibility told her that anything less than the best legislative job was a potential abrogation of power to the Judiciary, which was unintended by the Constitution.

Her intellect is incisive. She is not led astray by irrelevancies. These qualities will help her decide which of todays many complex legal issues deserve the attention of the Supreme Court.

Mr. Chairman, you can expect Judge O'Connor to settle for no less than the best from our Courts. I suggest that we can ask no more than that. Judge O'Connor's record and reputation is her best recommendation, but I am happy to add my name to the long list of those who support her confirmation.

Sincerely,

BOB STUMP
Member of Congress

BS:bd
cc: Members of the Judiciary Committee

The **Chairman**. I have a letter from Senator Gordon Humphrey requesting that you answer certain questions. I would turn that over to the staff. If you could answer those by tomorrow it would be appreciated.

[Material follows:]

September 11, 1981

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In his letter of September 9, 1981, Senator Humphrey sets forth the following questions:

1. Do you believe that all human beings should be regarded as persons for the purposes of the right to life protected by the Fifth and Fourteenth Amendments?
2. In your opinion, is the unborn child a human being?
3. What is your opinion of the decision of the Supreme Court in the 1973 abortion cases, Roe v. Wade and Doe v. Bolton?
4. Do you believe the Constitution should be interpreted to permit the states to prohibit abortion? If your answer is yes, are there any types of abortions where you think the Constitution should be interpreted so as not to allow such prohibition?
5. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child has an abortion performed on her?
6. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is sterilized?
7. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is given contraceptives by a third party?

The first and second questions concern the definition of human life and the legal consequences which attach to that definition. Congress is currently considering proposals directly addressed to these issues. Questions concerning the validity and effect of these proposals, if any are passed, might well be presented to the Supreme Court for decision.

A nominee to the Court must refrain from expressing any view on an issue which may be presented to the Court. A federal judge is required by law to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455; see Code of Judicial Conduct, Canon 3C. If a nominee to the Supreme Court were to state how he or she would rule in a particular case, it would suggest that, as a Justice, the nominee would not impartially consider the arguments presented by each litigant. If a nominee were to commit to a prospective ruling in response to a question from a Senator, there is an even more serious appearance of impropriety, because it may seem that the nominee has pledged to take a particular view of the law in return for the Senator's vote. In either circumstance, the nominee may be disqualified when the case or issue comes before the Court. As Justice Frankfurter stated in Offutt v. United States, 348 U.S. 11 (1954), a core component of justice is the appearance of justice. It would clearly tarnish the appearance of justice for me to state in advance how I would decide a particular case or issue.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases, Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest kind of question as to whether I was qualified to sit on that Court." Hearings at 138. More recently, the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." Hearings at 18.

Questions three and four directly raise the issue of the correctness of particular Supreme Court decisions. In Roe v. Wade and Doe v. Bolton the Supreme Court held that states may not prohibit abortions during the first trimester of pregnancy. Questions related to the issues reached in these decisions may come before the Court, and the Court may also be asked to reconsider the decisions themselves. For the reasons I have stated in this letter as well as in my testimony before the Senate Committee on the Judiciary, it would therefore be inappropriate for me to answer questions three and four.

The fifth question concerns the constitutional validity of a law requiring parental consent prior to the performance of an abortion on an unmarried, unemancipated minor child. Several state statutes dealing with this subject have come before the Court and have resulted in sharply divided decisions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court ruled unconstitutional a statute requiring parental consent before an unmarried person under 18 could obtain an abortion. The Court specifically noted, however, that it was not ruling that every minor was capable of giving effective consent, simply that giving an absolute veto to the parents in all cases was invalid. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court struck down a statute which required parental or judicial consent prior to the performance of an abortion on an unmarried minor. The Court failed to agree on a majority rationale. Just last Term, however, in H.L. v. Matheson, 101 S.Ct. 1154 (1981), the Court upheld a Utah statute requiring notification of parents prior to an abortion, at least as the statute was applied to an unmarried, unemancipated minor who had not made any claim as to her own maturity. These decisions indicate that the area is a particularly troublesome one for the Court, and also one in which future cases can be expected to arise.

The Supreme Court has recognized that "the parents' claim to authority in their own household is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1958) (plurality). My sense of family values is such that I would hope that any minor considering an abortion would seek the guidance and counseling of her parents.

The sixth question concerns the constitutional validity of a law requiring parental consent before an unmarried, unemancipated minor child is sterilized. Once again I would hope that any minor considering such a drastic and usually irreversible step would seek the guidance of his or her parents and family. It would be inappropriate for me, however, to express any view in response to a specific question concerning the legality of a parental consent law, because the whole area of the constitutionality of statutes requiring parental consent is in a stage of development and because such statutes are likely to be presented to the Court for review. My hesitation is also based on the fact that I have not had the benefit of a specific factual case, briefs, or arguments.

The final question concerns the constitutional validity of a law requiring the consent of parents before an unmarried, unemancipated minor child is given contraceptives by a third party. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a law making it a crime for anyone to sell or distribute nonprescription contraceptives to anyone under 16. The case, however, did not involve a parental consent requirement; indeed, Justice Powell found the law offensive precisely because it applied to parents and interfered with their rights to raise their children. Id. at 708 (concurring opinion). A three-judge district court found a state law prohibiting family planning assistance to minors in the absence of parental consent unconstitutional as interfering with the minor's rights, T.H. v. Jones, 425 F.Supp. 873, 881 (Utah 1975), but when the case reached the Supreme Court it was affirmed on other grounds, 425 U.S. 986 (1976). The constitutional question is therefore still open, and I must respectfully decline any further comments for the reasons set forth previously.

Mr. Chairman, I appreciate the opportunity to set forth my views on these matters in response to Senator Humphrey's letter.

Sincerely,

Sandra Day O'Connor

Sandra Day O'Connor

The CHAIRMAN. Senator Biden has asked for a special concession of 3 more minutes.

Senator BIDEN. Thank you, Mr. Chairman.

Judge, I want to just cover one area that, although I had to be out of the room for about an hour and a half, I do not think was covered. That was relating to court procedure in standing.

In deciding whether standing exists or whether a class action would properly lie, should a Supreme Court Justice take into account his or her belief, assuming that it is held by that Justice, that the courts are too congested and that the dockets are too crowded when determining whether or not standing exists or whether or not a class action properly lies?

Judge O'CONNOR. Senator Biden, I have not had to address this question. As a judge, it seems to me that primary in determining whether to decide that a given case is a justiciable case would be perhaps factors other than court congestion—the importance of the issue, the posture in which the case is, the other factors that one normally considers.

Senator BIDEN. I would hope that that would be the case. Although the courts clearly are congested in many areas and although the dockets are sometimes too crowded, it seems to me that the ability to have access to justice should not be precluded as a consequence of the inability of either the judiciary and/or the legislative body to make accommodations for access to justice.

I would hope that as a Justice you would not make as part of your decision whether or not to preclude access the fact that it was crowded—in other words, "You came too late, fella—sorry—even though you have a justiciable case." I would hope that would be your position, as you stated.

I have no further questions. Thank you very much for your comments.

Judge O'CONNOR. Thank you.

The CHAIRMAN. Senator East, did you have any further questions?

Senator EAST. No, thank you, Mr. Chairman.

The CHAIRMAN. That concludes with you this afternoon, Judge O'Connor. We have some other witnesses, so we are going to go ahead. I want to be sure we finish tomorrow, if possible, by 1 o'clock.

Judge O'CONNOR. Thank you.

Senator BIDEN. You are welcome to stay.

Judge O'CONNOR. Thank you, Senator Biden.

The CHAIRMAN. Thank you.

Judge O'CONNOR. With the permission of the Chair then, thank you, Mr. Chairman. I shall withdraw.

The CHAIRMAN. Now we have a panel consisting of the Honorable Tony West, the Honorable Donna Carlson West, and the Honorable Art Hamilton, members of the Arizona House of Representatives.

If you folks would come up, we would be glad to hear from you at this time.

Please stand and raise your right hands. I will now swear you in. Do you swear that the evidence you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **West**. I do.

Ms. **West**. I do.

Mr. **Hamilton**. I do.

The **Chairman**. Please be seated.

Mr. West, we might begin with you. We are allowing 5 minutes to each one of you. We have a large number of witnesses to hear yet. We can place your entire statement in the record unless you can give it in 5 minutes. If you can give it in 5 minutes, OK. If you cannot, I suggest we print it in the record in full and then you summarize it in 5 minutes.

TESTIMONY OF HON. TONY WEST, ARIZONA HOUSE OF REPRESENTATIVES

Mr. **West**. Mr. Chairman, thank you very much.

Before I begin my formal remarks I certainly want to reassure the American people and to congratulate you and the members of the Judiciary Committee for the outstanding job that you have undertaken here in the last 2 days.

I think you have seen why we from Arizona are here to testify on behalf of Sandra Day O'Connor as an Associate Justice to the Supreme Court.

If candor, intellect, endurance, and courage are part of the qualifications for being a nominee to the Supreme Court it is obvious why she has been appointed by President Reagan.

I am here today to give my wholehearted and unequivocal support to Judge Sandra Day O'Connor, President Reagan's outstanding nominee to the U.S. Supreme Court. In my judgment, she is eminently qualified to sit as an Associate Justice on the U.S. Supreme Court.

As you have seen, Judge O'Connor is gifted with an exceptional intellect; rational, judicial temperament; and an approach to problem solving which is logical, analytical, and well balanced.

Judge O'Connor is one of the few—if not the only nominee, to my knowledge—who has ever had training and experience in all three branches of government, ranging from her position in the Arizona State Senate—the legislative branch—as an assistant attorney general in the executive branch and, of course, her position on both the superior court and the court of appeals—judicial branch.

It is my observation that Judge Sandra O'Connor will provide a new beginning in reestablishing respect and credibility to the Supreme Court as an institution.

Though we all realize that this is an historic event, with Sandra being the first woman appointed to the Supreme Court, her recognition will go far beyond that of being the first female appointed.

Her effective leadership and the new vitality that she will bring to the Supreme Court will be a positive contribution to all people of our Nation.

In my judgment, with the exception of Sandra's obvious aesthetic beauty and her very feminine qualities, in the future it will be difficult at best to determine any gender by the reading or interpretation of her decisions.

Mr. Chairman, I am one of the leading pro-life legislators in the State of Arizona having been a sponsor and a major participant on every piece of pro-life legislation and pro-life action taken in the Arizona Legislature since my very first election.

While it is true, Judge O'Connor certainly was not a pro-life proponent while a member of the Arizona Senate, neither was she then nor to my knowledge has she ever been the friend of those who advocate the killing of the innocent unborn babies.

Abortion is a violent, silent holocaust taking place in our country today and is an absolute abomination, the ultimate evil plaguing our society. With the strong feelings that I harbor for the sanctity and the quality of life, I am certain in my own mind that Judge O'Connor shares these same concerns.

It is my opinion that the pro-life movement needs as many converts and friends as possible. This conversion process is normally accomplished through an intellectual and academic stimulus, as well as understanding, love, kindness, and above all, compassion shown to those who are not always sympathic to our own views.

A prime example in this hearing room today is Representative Art Hamilton, the Democratic Arizona minority leader, who went through this evolution and conversion process and is now one of our leading pro-life advocates.

It is my feeling that Judge O'Connor, in the reflection of the judicial setting, without constituency pressure and the quest for reelection, if she has not already done so, will come to the same conclusions about the sacredness and sanctity of human life both inside and outside the womb.

It is my opinion that her decisions on the bench will reflect that thoughtful, careful, and compassionate consideration that a mother of three and a person of destiny would be expected to reflect.

The phrase, equal justice under the law, will be deeply enriched with a new vibrancy with the confirmation of Judge O'Connor.

Mr. Chairman and members of the Senate Judiciary Committee, to know Sandra O'Connor is to love and to respect her. I assure you that with her grace and her eloquence she will captivate our Nation's Capitol as she has my State of Arizona.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We will now hear from the Honorable Donna Carlson West, a member of the Arizona House of Representatives.

TESTIMONY OF HON. DONNA CARLSON WEST, ARIZONA HOUSE OF REPRESENTATIVES

Mrs. WEST. Thank you, Mr. Chairman.

I might note before I begin my formal remarks that I, too, am a pro-life legislator from Arizona and I am known as the leader of the Stop-ERA movement in Arizona.

Mr. Chairman, I am very honored to have been asked to testify at these hearings on the appointment of Sandra O'Connor to the U.S. Supreme Court. President Reagan has chosen a gracious lady who has served Arizona admirably for a number of years. Our State will sorely miss the talents of such a brilliant lawyer, legislator, and jurist.

Sandra O'Connor is known in Arizona as an outstanding leader. In the legislature she was a driving force in passing many laws which were in the best interests of our State. She showed a commitment to equal treatment of all our citizens by revising antiquated, discriminatory statutes.

She also displayed a genuine concern for the taxpayers by initiating a wide-ranging bill that reduced local property taxes.

In addition to believing that laws should treat all people fairly and that the cost of government should remain reasonable, Sandra O'Connor believed that the actions of government should be a matter of public knowledge. Therefore, she was a strong supporter of legislation requiring government to make decisions in open meetings.

Judge O'Connor, our Nation's first woman State senate majority leader, has been an inspiration to her colleagues. Her personality draws out and enhances the best in others.

I began my association with Sandra O'Connor when I was a staff member in the Senate during her term in office.

I observed her to be meticulous, determined, independent, and, as one of your members said this morning, an ideal woman—a true role model for other women who would seek public office.

As a staunch supporter of the family and woman's important role as a mother and wife, I can assure you that Judge O'Connor also reflects this view.

With her numerous demanding professional and civic responsibilities she remains dedicated to her family. She has always displayed love and support for her sons and husband. She cherishes their shared experiences and private life together.

That is another reason I regard Judge O'Connor as proof that women can successfully combine family and career and contribute much to society in both roles. Many who have tried to persuade our young people that one must be sacrificed at the expense of the other would do well to emulate her approach to combining a professional and family life.

I must say that I disagreed with some of the votes that Sandra Day O'Connor cast as a State legislator. I have many friends who have been very vocal in expressing their opposition to those same votes. Because of my personal views against abortion, I am thankful that these concerns have been expressed. I truly believe that 5 years ago there would not have been the concern on the part of the public nor the members of this committee to ask the questions on abortion that I have heard during the course of this testimony. I am grateful that this issue has been raised by those who are truly concerned.

I am very pleased to hear Judge O'Connor's responses to the very difficult questions which you have asked. They reinforce my respect for the fine qualities she can offer as a jurist.

Her intellect and fair and impartial attitude will earn her the respect and recognition of all those in the Court, and from my observation she has an excellent grasp of a wide range of issues which may come before her. Saudra Day O'Connor understands the power of the Court. She believes in a philosophy of judicial restraint—interpretation rather than legislation.

In her decisions she is guided by logic and fact. Her concern for people often makes those decisions painful. In one case she heard as a superior court judge the decision was made to incarcerate the criminal, a mother who pled not to be separated from her family. Knowing that justice must be served, Judge O'Connor sentenced the woman to jail, knowing the pain the woman would suffer being separated from her children. Sandra O'Connor retired to her chamber and wept. She did what had to be done, but she showed a deep compassion. These qualities will make her a noteworthy, historic Supreme Court Justice.

I urge you to unanimously recommend the confirmation of President Reagan's nominee, Judge Sandra Day O'Connor, to the U.S. Supreme Court; and I thank you very much for giving me the opportunity to appear before you and express my views.

The CHAIRMAN. Thank you.

The Honorable Art Hamilton, a member of the Arizona House of Representatives.

TESTIMONY OF HON. ART HAMILTON, ARIZONA HOUSE OF REPRESENTATIVES

Mr. HAMILTON. Chairman Thurmond and members of the committee, thank you very much. I wish to thank you for this opportunity to address you regarding the nomination of Sandra O'Connor to be an Associate Justice of the Supreme Court. I consider this not only an honor but a tremendous responsibility.

The Supreme Court is for most Americans the last refuge of appeal when we believe our rights have been violated or ignored. This is particularly true of minorities who have reached out to the Court in an effort to see their liberties guaranteed. So I feel peculiarly sensitive to the kind of individual who should hold this awesome power over our lives, and this is in part why I am here.

Sandra O'Connor was an outstanding legislator with whom I served, but that is not why I support her nomination. She is as well an outstanding member of the bench in Arizona, but that is not why I support her nomination.

As I know you now understand, she is clearly an exceptional legal scholar, but that is also not the reason I am here.

I have come to Washington to state my support for Judge O'Connor because I believe that she is totally and resolutely committed to the ideal of equal justice under law.

In my years of dealing with Judge O'Connor I have never failed to be impressed by her intuitive sensitivity to the rights, hopes, and desires of the "have nots" as well as the "haves" of our society.

I do not know and cannot say how Judge O'Connor will vote on specific issues that come before the Court. I am confident that some of those decisions I am not going to agree with.

What I am sure of, and what I believe you can be assured of, is Judge O'Connor's fidelity to the Constitution and her impartiality in guaranteeing the rights of all Americans. She will, as they say, call them as she believes the Constitution calls her to see them. Of this much I am totally confident.

What I believe speaks best from my perspective is that when all else is said what remains is that Sandra O'Connor is a good and decent person of compassion, intellect, and good will. She loves this country and will seek to preserve, protect, and improve it.

I believe she deserves the support of this committee, the support of the U.S. Senate, and having gained those she will earn the support and respect of the people of these United States.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Grassley, do you have any questions of this panel?

PRO-LIFE STAND

Senator GRASSLEY. Yes, Mr. Chairman.

First of all, I appreciate your comments about what you believe to be her pro-life stand. As a person who has had some concern about her lack of being explicit, which I can understand, I would like to ask each whether or not you would expect her to be supportive of pro-life positions in the Supreme Court, as you know her today? I would like to have each of the three of you answer that.

Mr. HAMILTON. Senator Grassley, I do not know, sir; and I would not even attempt to speculate. I have a strong pro-life record, and I am very proud of that.

I think Sandra O'Connor is a good and decent person who will seek to do what she believes the Constitution calls for her to do.

I have faith that her position with regard to being pro-life is an evolving one. That is why I am here and in part why I am supportive, but I would not want to speculate what she is going to do. I tried that a couple of times when she was in the Senate, and I have not guessed right yet.

She has the best instincts of any person I have ever dealt with. I sincerely believe she cares about the rights of the unborn, and I believe she will seek to protect them.

Senator GRASSLEY. Mrs. West?

Mrs. WEST. Mr. Chairman and Senator Grassley, I would not want to speculate on how she might decide a case that dealt with the abortion issue. I think that she will weigh the facts of the case, consider the laws involved in that particular case, and make her decision based on her interpretation of those factors. I think that is a quality that we look for in a judge.

I have had private conversations with her on the issues of abortion and the Equal Rights Amendment and was satisfied with her views. I am convinced she is a woman of integrity. I am also convinced, though, that she will deal with each individual case based on the facts and the law; and I do not think we can ask any more of her.

Senator GRASSLEY. Mr. Hamilton?

Mrs. WEST. Mr. Chairman and Senator, I would not be sitting here making the testimony that I just gave if I thought for a moment that Judge O'Connor would come down for the continuation of the murder of the innocent unborn.

It is my personal judgment that she has gone through this conversion process. I think she has said in open hearing, under oath, that if she had to do it again she doubts if she would vote the same way she voted in 1970 and maybe on some of the other issues. God knows, I have made some votes that I have regretted and even been a little bit repentant for occasionally.

I believe that she fully recognizes that she is a woman of destiny and that she certainly believes in a divine creator. In my judgment we are going to be very satisfied with Judge O'Connor, her astuteness, her openess, and the balance that she is going to bring to the Supreme Court.

Senator **Grassley**. Mr. Chairman, I'm finished questioning the witness.

The **Chairman**. Thank you.

Senator DeConcini?

Senator **DeConcini**. Mr. Chairman, I have no questions. I want to thank my colleagues from Arizona for being here, for their forthright position, and for addressing one of the more sensitive issues that has arisen here and addressing it in a manner that I think is most proper.

I would like to call to the attention of the committee that Representative Tony West, not speaking in any manner in behalf of the Roman Catholic Church, is an ordained deacon in the church. I have known him for a long time in his commitment to the pro-life area, a commitment that I also have, and I am very pleased that he is here to express his conscience and his belief.

I also wish to thank Donna Carlson West and my friend, Art Hamilton, for taking the time, Mr. Chairman, from their full-time jobs. The Arizona Legislature is not a full-time job, and the pay is minimal. They all hold full-time jobs and have families and many commitments. To be back here today, I think, is an expression of the people of Arizona—how they feel about Judge O'Connor. I thank them sincerely for their forthrightness and the sacrifice of their time to be here today with this committee.

Thank you.

The **Chairman**. I want to thank you, ladies and gentlemen, for your presence here and for the testimony you have given. You are now excused.

Our next panel consists of the Honorable Leo Corbet, president of the Arizona Senate; the Honorable Stan Turley, a member of the Arizona Senate; and the Honorable Alfredo Gutierrez, a member of the Arizona State Senate.

Would you gentlemen please come forward? We will be pleased to hear from you.

I had better swear you in first. Would you rise and hold up your right hands? Do you swear that the evidence you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Corbet**. I do.

Mr. **Turley**. I do.

Mr. **Gutierrez**. I do.

The **Chairman**. Would you identify yourselves? We will start on the left.

TESTIMONY OF HON. LEO CORBET, PRESIDENT, ARIZONA STATE SENATE

Mr. **Corbet**. Mr. Chairman and members of the committee, my name is Leo Corbet. I am the president of the Arizona State

Senate. I had the privilege of serving with then Senator O'Connor and now Judge O'Connor for two terms when she was in that same senate.

I came here, as you know, with a prepared statement which I will submit and try to summarize some of the things in deference to the kindness of this committee.

The CHAIRMAN. Do you want the entire statement to go in the record or what you say now?

Mr. CORBET. What I say now.

The CHAIRMAN. All right. You may proceed.

Mr. CORBET. Thank you.

It is very difficult, I think, to do anything that would add to the luster of Senator and Judge O'Connor after these last 2 days of hearing. You know now what we have known for a long time in Arizona; and that is that she is articulate, prepared, intelligent, and she is the kind of person you want doing any number of important jobs, whether it be at the State or the Federal level.

The support of the people who have come back here to testify in her behalf, I think, is testimony itself of the kind of person she is, from the Democratic side, to some of us Reaganites, to Roman Catholics. All of us are proud of Sandra. We are proud of the job that she has done.

As a State legislator and one who is an advocate of States' rights, I am especially pleased to see someone of her caliber and her background on this Court. As a lawyer, I have served with her in the legislature of course and also been before her in the court of appeals, and I can tell you that the kind of preparation that she showed the gentlemen of this committee is the kind of preparation that she brings to each job and each task that she is assigned.

I can also say that Sandra O'Connor is a very special person and that our beloved Constitution will be in good hands with her on the Court.

I thank you very much.

The CHAIRMAN. Thank you.

Would you please give your name and position?

TESTIMONY OF HON. STAN TURLEY, ARIZONA STATE SENATE

Mr. TURLEY. Mr. Chairman and members of the Judiciary Committee, my name is Stan Turley. I am a Republican State senator from Arizona. I appreciate very much this opportunity to appear before you on behalf of Judge O'Connor as nominee to the Supreme Court of the United States.

I am impressed today with your patience, Mr. Chairman. I have heard of you for many years, and it is a privilege to now see you in action and to see you going after hours.

I am impressed also with the depth of the hearing that has taken place here. I want you to know that my feelings toward this whole process have been reinforced with what I have seen here today.

I have known Judge O'Connor and her family for many years. My first acquaintance with her was as an assistant to the State attorney general. At that time I felt she was destined for more than a windowless office in the attorney general's office, although I confess that I did not foresee the scene before us today.

We worked closely together as members of the majority in the State senate, so I feel that I know her well. She is an unusual lady of many talents which you are hearing about and which I need not repeat. There are, however, a few aspects of Judge O'Connor's nomination to which I would like to call particular attention.

Foremost, Sandra holds what I consider to be the proper perspective of the role of the three branches of Government. By that I mean she has demonstrated her strong belief in the separation of powers between the executive, legislative, and judicial branches as they function in our system. She has shown impatience with the judicial branch when it has been used to make law rather than to interpret law.

Judge O'Connor has a heritage from a pioneer family in Arizona that is unique. The family has been located on the same old ranch for just over 100 years. It is a big, isolated, tough, hard outfit located in a hostile desert environment subject to all of the forces of nature such as drought, winds, floods, grasshoppers, range fires, predators, and almost anything else you want to mention.

To be reared in this environment where so many things are beyond man's control sometimes—not always, but sometimes—gives an added dimension of character to those who are subject to those forces. A dimension of humility, fortitude, of faith in divine providence, integrity, and commonsense developed from meeting that type of challenge.

In my opinion, Sandra has this added dimension to a high degree. True, it is an intangible; nevertheless it is real.

Much has been said about Judge O'Connor's stand on abortion and the equal rights amendment. Whatever her position on these matters, I can say without fear of contradiction that she was not an activist leading the charge on these issues.

As a member both of the State and national right to life organizations and a long-time opponent of the equal rights amendment, I have no reservations whatsoever in supporting her nomination to the High Court.

Here are the reasons why: I know Judge O'Connor to be a person of integrity, highly qualified, intensely dedicated to excellence, a fair-minded person with a great empathy and understanding of the problems of the common man. She has a balance that is needed in this appointment.

You will go far to find a person equally at home ladling out beans to a work crew in a cow camp, attending a board meeting of a large bank, ironing shirts for her sons, leading the Arizona Senate as majority leader, counseling with the Salvation Army people, and presiding as a judge in our court system.

I suppose she has her failings, but I am convinced that Judge O'Connor has all those basic qualifications to be a great Supreme Court Justice. I strongly urge her confirmation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Gutierrez.

TESTIMONY OF HON. ALFREDO GUTIERREZ, ARIZONA STATE SENATE

Mr. GUTIERREZ. Thank you, Mr. Chairman.

My name is Alfredo Gutierrez, and I am an Arizona State senator. I came to the Arizona Senate as a Democrat in 1973 when Sandra O'Connor was the Republican majority leader. Two years later I was to succeed Judge O'Connor as majority leader when my party gained control of the senate.

During the years that I served on the legislature with Sandra O'Connor we inevitably found ourselves on the opposite side of many issues as I became the leader of the liberal wing of the senate Democrats while she was the spokesman for the essentially conservative positions of the Republican caucus.

Despite the fact that we were frequent foes on the floor of the Arizona Senate, I never had cause to doubt either her sincerity or her ability. Sandra O'Connor always represented her positions in a manner that revealed meticulous research and a thorough grasp of the intricacies of the law. She also conducted herself with great fairness, and I think that fundamental fairness is an excellent sign for the minority communities of the United States.

As a result of my legislative service with Sandra O'Connor I know that the U.S. Supreme Court will be gaining someone who has conducted herself according to the highest standards of integrity as well as someone who has demonstrated both a respect for and a profound knowledge of our Constitution and law.

Thank you very much, Mr. Chairman, for this opportunity.

The CHAIRMAN. Thank you, Senator.

Do you have any questions, Senator Grassley?

Senator GRASSLEY. No, thank you, Mr. Chairman.

The CHAIRMAN. Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I have no questions. I think the fine statements given by my friends and colleagues here speak well of the caliber of the legislators in Arizona, and I thank them sincerely for taking their personal time from their jobs and families to be with us today.

The CHAIRMAN. I want to express my appreciation to you ladies and gentlemen—Members of the Senate and Members of the House, both—for coming to Washington on your own initiative and testifying in these hearings. We appreciate it.

You are now excused.

The CHAIRMAN. We will now call on Mr. Gordon S. Jones of United Families of America.

Mr. Jones, please come forward and take a seat.

Is Mr. Jones here?

[No response.]

The CHAIRMAN. Ms. Ann Neamon, Citizens for God and Country—is Ms. Neamon here?

[No response.]

The CHAIRMAN. Frank Brown, National Association for Personal Rights in Education?

Mr. Brown, please come forward and hold up your hand to be sworn. Do you swear that the evidence you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BROWN. I do.

The CHAIRMAN. You may proceed for 5 minutes, Mr. Brown.

TESTIMONY OF FRANK BROWN, CHAIRMAN, NATIONAL ASSOCIATION FOR PERSONAL RIGHTS IN EDUCATION

Mr. BROWN. The National Association for Personal Rights in Education, a parental group dedicated to the personal civil, and consitutional rights of families and students to academic freedom and religious liberty in education, appreciates the opportunity to speak here today.

The confirmation of any new Justice to the U.S. Supreme Court is a fateful step in the process of American Government, for it gives a specific citizen a sweeping and lifelong judgment over the rights and property of the citizens of this country, a power that can be used beneficially in the light of the Constitution, but a power that can be used harmfully in the light of the background and personal values of the justice.

Today the National Association for Personal Rights in Education [NAPRE], a parental group dedicated to the personal civil and constitutional rights of families and students to academic freedom and religious liberty in education, appreciates the opportunity to speak on the occasion of the hearings on Judge Sandra Day O'Connor.

We are a parental group. We do not speak for any church or school, nor does any church or school speak for us. In our 22-year history we have struggled, mainly in Illinois, for types of parental and student grants—for example, the voucher—through which families and students would have an equitable share of the education tax to attend the schools, public or private, of their choice. We have also at times supported tuition tax credit bills that contain negative income or refundability provisions through which low-income families having a tax credit of $500 and a tax indebtedness of $200 would receive a refund of $300.

Judge O'Connor does not in this matter have an ascertainable record as a legislator and none as a judge. However, when an Arizona senator, she was quoted in the Phoenix magazine—February 1971—during a period when tuition tax credit legislation—for example, senate bill 1161—was an issue as saying that State aid to private schools is "clearly unconstitutional." The New York Times, June 12, 1981, reports that in the senate she opposed public aid to parochial and private schools.

In view of these reports we address three main lines of concern. First, we are concerned that families seeking tax benefits for children in church-related elementary and secondary schools are told by the Supreme Court that such benefits are as violative of the establishment clause as are benefits to church schools. But the personal rights of parents and children stand on their own constitutional merits and may not be denied by reason of any relationship between the State and any church or school.

Such families are accused of subterfuge, of trying to attain indirectly an unconstitutional goal that cannot be achieved directly, namely, aid to religion, but the reverse is the case, with those who cannot directly refute the personal rights of parents and students doing so indirectly by invoking church-State controversies.

Unfortunately some justices, in their absorption with church-State matters, have lost sight of parental and child rights, but fortunately three present justices, Chief Justice Burger and Justices Rehnquist and White, are aware of these rights, with Burger saying, in his dissent in *Lemon* v. *Sloan* (1973):

> The essence of all these decisions (*Everson, Allen*), I suggest, is that Government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions . . . But, at least where the state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences . . . the Establishment Clause no longer has a prohibitive effect.

In his dissent in *Meek* v. *Pittenger* (1975), a decision denying tax benefits to handicapped children in church-related schools, Burger condemned the economic pressure put on parents in a moving and disturbing statement,

> The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able po cope with this denial of equal protection, which is, for me a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance.

Our second concern is that the determination of education tax benefits for children, including those in church-related schools, is a public policy matter under the control of the legislature rather than of the judiciary.

The State legislatures established the State public schools with a monopoly of the education tax in the mid-19th century. Many families, especially in some sections of the country, did not accept these schools on grounds of academic preference and religious conviction, but, with the dominant Protestant churches throwing their political strength behind them, these schools have done much good educational work in this country.

However in recent years many parents and citizens have become disenchanted with them. Many hold that the academic quality has gone down, that the schools are not developing character, that the concept of the child as a person capable of developing independent intellectual habits has been widely displaced by a behaviorism which seeks to manipulate the student—Lance Klass, "The Leipzig Connection"—that many are not prepared for possible defense of the country, that many are unemployable, and that, with the accreditation process overloaded with teaching methods rather than academic content, the intellectual level of the teachers has declined.

To heal old wounds and meet new needs State legislatures have in recent years enacted many laws to provide tax benefits for children in alternative schools, but almost all their efforts have been struck down by the Court as though the legislators are children without any sense of the public policy needs of their constituents. As a group which has in the past 12 years in Illinois sponsored eight parental grant bills, four of which passed the House, we can attest that the most effective opponent of parental freedom of choice in education is the U.S. Supreme Court.

As a group active in the innercity, we have struggled to obtain some form of tax-supported alternative schooling for minorities and have argued that for the minorities the voucher would be a long step forward to first-class status in this society, for it would give them economic control over the schooling of their children. In this respect incidentally on our last parental grant House floor vote, of 14 minority Representatives, 12 voted yes, with 1 present and 1 absent.

Our third concern is that the relevant court decisions are based on misinterpretation by Justice Hugo Black in the *Everson* (1947) case of the meaning of the establishment clause.

In building up his interpretation of the establishment clause, Black relied almost exclusively on the successful struggle of Madison and Jefferson in Virginia to outlaw any church or religion being given preferential tax status.

Black concluded that the establishment clause meant, among other things, that neither a State nor the Federal Government could pass laws which aid all religions and upon this base the Supreme Court has built up its doctrine outlawing tax aid to parents and children in church-related elementary and secondary schools. As to Black's conclusion, Michael Malbin in his monograph "Religion and Politics: the Intentions of the Authors of the First Amendments" points out that not only was this the first time that the Court outlawed nonpreferential aid to religion but also that the congressional debates on this matter do not uphold the Court's action. As to the new Court doctrine on aid to parents and children, there is no logical explanation as to how the Court has been able to use the defeat of the Virginia establishment to deny tax equity to children in church-related schools.

If Justice Black wanted to find out what the people at the time of the founding of the Government meant establishment to be, why then did he not refer to Elliott's "Debates," which in reporting the debates over ratification of the Constitution in the various States gives abundant proof that the people widely considered establishment to be Government support of one preferred sect or religion. Why did not Black study the "Annals of Congress," which as Malbin points out, reveals quite adequately that Madison—while privately thinking that an establishment clause was unnecessary—urged in the congressional debates on this matter an amendment outlawing the establishment of a national religion.

If Black did not get his ideas on this matter from the struggles against church or religion establishment, where did he get them? Actually his ideas stem from the rationale behind the public school, which justifies a monopoly of the tax for those who conform and denies any taxes, even their own, to heretics.

In a search for the logic of the law, we ask, if an equitable share of the education taxation is denied to students in Catholic, Baptist, Lutheran, and Christian elementary and secondary schools, how come that the State and Federal Governments can provide all sorts of loans and grants to students in Baptist, Methodist, and Catholic colleges?

Can the Court, using stare decisis, continue to hold to its unscholarly and harmful decisions in this matter? Perhaps so, for it has the power to do so, but it is meeting a stiff resistance from within, as the following judicial statements of dissent in *Meek* v. *Pittenger* (1975) demonstrate.

Thus Justice Rehnquist, with White concurring:

> The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question, and (a)ny interpretation of (the Establishment Clause) and constitutional values it serves must also take account of the free exercise clause and the values it serves.

Thus Chief Justice Berger:

> One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.

In conclusion, we would be distressed to have any more Justices on the Court who in this matter have prejudged our parental rights and the rights of our children.

We therefore respectfully seek to determine whether Judge O'Connor recognizes that parents and children have rights that have a constitutional life independent of church-State confrontations; whether she considers that the determination of educational tax policy is, with due respect for parents, a public policy matter in the hands of the legislators; and whether she would reexamine the scholarship, or rather lack thereof, on which the present Court doctrine in this matter now rests.

The CHAIRMAN. Senator Grassley?

TUITION TAX CREDITS

Senator GRASSLEY. I would like to have you give me your understanding of her position regarding tuition tax credits, where you are quoting from, and the appropriate date of when she said what she said.

Mr. BROWN. Senator, as I said, there is no ascertainable record as a legislator and none as a judge. We went over the journals—the journals were gone over fairly closely. At that time—somebody mentioned here 1970–73—there were no recorded votes in the committees in the Arizona Legislature.

She was quoted in the Phoenix magazine of February 1971, during a period when tuition tax credit legislation, S.B. 1161, was an issue, as saying that State aid to private schools is "clearly unconstitutional."

Senator GRASSLEY. Does the article make it clear whether or not that statement of unconstitutionality was made in regard to her understanding of the Arizona State constitution or the Federal Constitution?

Mr. BROWN. It was not clear.

Senator GRASSLEY. If that was her view relative to the Arizona State constitution, it is one thing; if that is her view of the Federal Constitution, then it is quite a different thing.

Mr. BROWN. It is not there, and it is very difficult to get anything. Our people looked through all the records and everything else.

Senator GRASSLEY. Let me explain to you the difference between language in the first amendment of the U.S. Constitution and similar language in the Iowa constitution—my home State.

The Iowa constitution is more restrictive in regard to that and more explicit than the Federal Constitution.

I am not making any commentary on your position or to whether or not there is any legitimacy to what you say. We ought to make clear for the record when the statement was made, and you have made that very clear.

If you could expand on that statement—not now, because you do not have the information; but if you could get the information, I think that would be significant.

Mr. BROWN. On the Arizona constitution, our main objections still hold—that there are guarantees of individual religious freedom in the Arizona constitution, the Illinois constitution, and others, which prevail as far as the protection of the rights of the family and the rights of the parent, which prevail over any effort to try to deny aid to a church school.

No matter how tightly provisions are drawn, the rights of the individual under the State constitutions—and I know this is so in Illinois—the right of religious freedom is so carefully drawn as to protect the right of the individual. I am sure that is the same in Arizona.

Senator GRASSLEY. I can only suggest this to you: If she was referring to the Arizona State constitution, I am not sure that that can be a basis for determining her views as to whether or not tuition tax credits violate the Federal Constitution.

Mr. BROWN. I understand that.

The CHAIRMAN. Are there any further questions?

[No response.]

The CHAIRMAN. Thank you very much for your presence and your testimony.

Mr. BROWN. Thank you for the opportunity.

The CHAIRMAN. I think the time has come now that we will take a recess until 10 o'clock tomorrow morning. At that time the committee will reconvene, and Judge O'Connor will be back at that time for questioning by the distinguished Senator from Alabama, Senator Denton.

[Whereupon, at 5:45 p.m., the hearing was recessed, to reconvene the following day at 10 a.m.]

NOMINATION OF SANDRA DAY O'CONNOR

FRIDAY, SEPTEMBER 11, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 1202, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Laxalt, Dole, East, Grassley, Denton, Specter, Biden, Byrd, Metzenbaum, DeConcini, Leahy, and Baucus.

Staff present: Vinton D. Lide, chief counsel; Quentin Crommelin, Jr., staff director; Duke Short, chief investigator; and Candie Bruse, chief clerk.

The Chairman. The Judiciary Committee will come to order.

The questioning of Judge Sandra O'Connor will resume. Judge O'Connor, I would remind you that you are still under oath.

Judge O'Connor. Thank you.

The Chairman. I shall now call upon the last Senator, I believe, on the second round, the distinguished Senator from Alabama, Mr. Denton.

TESTIMONY OF HON. SANDRA DAY O'CONNOR, NOMINATED TO BE ASSOCIATE JUSTICE, U.S. SUPREME COURT—Resumed

Senator Denton. Thank you, Mr. Chairman.

Good morning, Judge O'Connor.

Judge O'Connor. Good morning.

Senator Denton. At the outset, let me clear up what amounted to a misunderstanding on my part yesterday. I had questioned you on your personal views on abortion, and you stated during that exchange, "It remains offensive at all levels," and stated that you think it is a problem at any level.

Then I thought I heard you say that you would not be in favor of abortion even to save the life of the mother. After several others had thought the same thing, and then having been questioned by some news people, I did look at the transcript and so forth and find out that that is not what you said.

You actually said: "Would I personally object to drawing the line to saving the life of the mother? No, I would not." You went on to say: "Are there other areas?" Then you said: "Possibly."

Therefore, I would have to withdraw my statement since it was based on error in understanding you. I misunderstood you. I would have to say that it appears that indeed you are not more conservative than I on that issue, and I would remind you that legislatively the Congress has done what it could to outlaw or forbid payments for Government funding of abortion except to save the life of the mother.

That is where Congress drew the line but we could not go any further than just stop Goverment funding for it. We could not get into the legislation of abortion with respect to the public because we were preempted by a Supreme Court manifestation of judicial activism in the *Roe* v. *Wade* decision. Therefore, there is a real problem of that judicial activism, and I am sure that not all of my colleagues would agree that it is the wrong kind but, nevertheless, there was that example.

Therefore, I have learned that you are less conservative than I, and as I go into the Kenneth Starr memorandum I would refer to a previous statement of yours which said that you felt that your personal feelings should not constitute the basis of decisions made on this matter or any other matter in the Supreme Court, before the Supreme Court, but rather that if there is a constitutional principle which applies, it should be the determining factor.

I submit that in the Declaration we do have the statement, "all men created equal," et cetera, "endowed by their Creator with certain inalienable rights. Among these are life * * *." Then in the Constitution, in the Bill of Rights, article 5, "No person can be deprived of life without due process of law."

Senator East, as you know, has been conducting hearings to determine whether or not a fetus is a person. I agree that that is a very difficult question. I do not agree that it is difficult to determine that it is human life. I believe that that is irrefutable.

I believe that, as I said before, our democracy is predicated on respect, infinite respect, for human life. Socrates, whom we may be proving right these days, has said that a democracy cannot work because sooner or later the people will perceive that they can get their hands in the till; elected officials will cater to that trend, and bankruptcy will result. I think we are on the way to proving that, were on the way to proving that true. We are trying to turn that around.

He also indicated that the majority would crunch the minority in every case in a democracy. By our system we have been proving him wrong so far—and I am justifying why I am going into the Kenneth Starr memorandum and the abortion issue further.

The Judeo-Christian ethic brought compassion into the picture. The ethic did not exist as a religious principle in Socrates' day. He tried to talk about a "one god" thing and they poisoned him because he did not believe in all of the gods being the way to go. Therefore, we do have a substantial portion of the world believing in that God, and among those nations the United States has been one of the more notable.

That ethic of compassion applied to the dog-eat-dog majority rule in the political sense, and the otherwise dog-eat-dog, free-enterprise system, is in my opinion what has gotten us to the point where we have proved Socrates wrong, have made a success out of democracy. To me, compassion is the key to civil rights, to human rights, to caring for the needy, to the survival of a democracy. If you break down compassion, you will find the prefix "com"—with—and the word "passion"—passion for what? Humanity, infinite, godlike humanity.

The human life in the womb is the most needy, most dependent, most helpless minority, for which—for whom, depending on how you want to look at it—we must have compassion. Our real political, economic, military, and psychological problems from my point of view—and I thought of this a great deal in prison and after coming home—all stem from our growing preoccupation—which has been repeated over and over in history—as a nation becomes more preoccupied with luxury than necessity, we have become "me-istic." We have stopped thinking about the other guy as much, our wife or our husband, our brother, our fellow of another color, our colleague of another color.

I believe that abortion is the opposite of compassion for that being which needs it the most. I believe that history will prove that once a nation goes that way, from an ethic like ours, as Nazi Germany did, you immediately get involved with infanticide, euthanasia, genocide, and the whole idea of selective murder. This brings into play the question of the convenience of the existence of that person which is based on human judgment. That is why I feel so strongly about what might be called fetal rights, the right to survival on the part of that human life.

I do not believe, with you, that learning more about fetuses will ever change the fact that there is life there, God-given life which we do not understand, and we do not even know what makes grass grow. How can we get into the process of deciding, for convenience or for money—because that kid is going to cost money if it is born—or embarrassment that we want to spare the 13- or 14-year-old girl—and you have said that you are opposed to it for birth control purposes.

However, I want to know what you meant yesterday when you said, "Are there other areas?"—besides saving the life of the mother—and then you said, "Possibly." I would have to say that that is less conservative than that which Congress has indicated as its collective will, and it leaves me befuddled as to where you are. I feel I have gotten nowhere, in that you have said possibly there are other areas. We could go on for perhaps a month, and if that is all the specific you are going to be, I would not know at all where you are coming from philosophically on that issue.

Judge O'Connor. Senator Denton, I believe that I recounted previously for the committee my vote in the legislature on funding in connection with the bill for providing medical care to indigents, where I did support a measure that provided for certain exclusions in addition to what was necessary to save the life of the mother. In that instance it included instances of rape and incest, criminal actions, and I supported that.

Senator Denton. However, the criminal action—a little baby to be—is not involved in.

Judge O'Connor. I simply was trying to indicate, Senator Denton, where I had had occasion to vote as a legislator on the issue. These are very difficult questions for the legislator because, of course, people—many people—share your very eloquent views and your very perceptive views on this most pressing problem.

There are others who, perhaps out of different concerns, might draw the line in some slightly different fashion or indeed in some substantially different fashion, and these are the troubling issues that come before a legislator when asked to specifically draw the line. I appreciate that problem. I think I can simply indicate to you how I voted at that time on that issue.

Senator **Denton**. OK. Well, with respect to some of those votes, then, I would like to go into the document which has become known as the Starr memorandum. I would preface that by a question. You feel abortion is personally abhorrent and repugnant. Would it follow that you believe the unborn ought to be legally protected? If so, how and at what stage of their development?

Judge **O'Connor**. Senator Denton, excuse me. Is that your question?

Senator **Denton**. Yes. You have stated that you feel it is personally abhorrent and repugnant, and that it is a legislative matter to deal with it. Do you mean by that that we should legally protect the unborn? If so, how, considering the *Roe* v. *Wade* activism from the judicial branch?

Judge **O'Connor**. Well, Senator Denton, a legislative body at the State level today would be limited in that effort by the limitations placed in the *Roe* v. *Wade* decision. I recognize that. If a State legislature today were to try to draw the lines, it would have to reckon with that decision, which of course places substantial limitations on the freedom of State legislative bodies presently.

Senator **Denton**. Until that decision is changed or if something comes up to render it subject to change, it makes your appointment extremely important and your philosophy on that matter extremely important. Therefore, I hope you can appreciate the interest of those tens of millions—and there are tens of millions on the other side—who are interested in your position on that. I am not clear that we have drawn much out. Let me get on this——

Judge **O'Connor**. Senator Denton, I do appreciate the concerns and the strongly held views of so many people on this issue.

Senator **Denton**. I understand that.

On July 7, 1981, you had two telephone conversations with Kenneth W. Starr, counselor to the Attorney General of the United States.

Judge **O'Connor**. Excuse me. On what date, please?

Senator **Denton**. July 7, 1981, is my information.

Did you state in one or both of those conversations that you "know well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and have never had any disputes or controversies with her"?

Judge **O'Connor**. Senator Denton, I am sure that I indicated that I knew Dr. Gerster. Indeed, she lives in the same community in which I live, the Scottsdale-Paradise Valley area.

Senator **Denton**. Yes, and you are acquaintances.

Judge **O'Connor**. We have children who have attended the same school, and I have seen her on any number of occasions.

I had occasion, of course, to see her in 1974 in my capacity as a legislator as well. She at that time was interested in the house memorial 2002, dealing with the question of whether the Arizona Legislature should recommend to the Congress an amendment of the U.S. Constitution as a means of addressing the *Roe* v. *Wade* decision. Dr. Gerster——

Senator DENTON. Excuse me. I do not mean to be impolite but in the interest of trying to stay within the time, the only part of the question that I am—the question deals with whether or not you said that you had never had any disputes or controversies with that leader, Dr. Gerster. Did you say that, because the Starr memorandum is quoted as having had you saying that?

Judge O'CONNOR. Senator Denton, I am sure that I did indicate that and I would like to explain precisely why I said that.

As a legislator, I had many instances in which people would come before the legislature and espouse a particular position with regard to a particular bill. I as a legislator was obligated to listen to those views along with the views of others, and then ultimately cast a vote. My receiving of information of that sort and ultimately casting a vote, even if it were cast in a manner other than that being espoused by the speaker, did not cast me in my view in the role of being an adversary.

I did not feel that in my position as a legislator, that every time I voted against a measure that someone in the public sector was supporting publicly in front of me, that I became an adversary. I was not a leader in connection with the passage or defeat of house memorial 2002. I was a legislator——

Senator DENTON. I understand. I really do understand the thrust of your answer. It does appear, however, that the thrust that one would take from that answer which was quoted is that you and the right-to-life movement leader there really had no disputes on probably that issue. That I think might have been gleaned from that statement. I leave that to speculation. It certainly would have been my inference from it.

Judge O'CONNOR. Well, Senator Denton, I think that it is important to recognize that what I am trying to reflect is that because I may have voted differently than Dr. Gerster would have, had she been a legislator, does not mean that we are adversaries.

Senator DENTON. Yes, I understand. However, there has been much opposition to your nomination and public statements by Dr. Gerster, which probably we will hear some of later, concerning her opposition to many of your past legislative decisions. Therefore, there was an inconsistency, not in what your attitude was or what your statement was but I think with respect to the thrust of what that inclusion in Mr. Starr's report might have been intepreted as meaning.

Did you tell Mr. Starr that you did not remember how you voted on a bill to legalize abortion in Arizona, or that there is no record of how you voted on legislation to legalize abortion in Arizona? I believe we heard you say that you had some difficulty remembering one, and you had to get it out of a newspaper because it was not in the legislative records. Somebody in Arizona has said that that was the equivalent of not remembering how one would have voted on the Panama Canal issue.

Judge O'CONNOR. Senator Denton, as I explained I think in the first day of these hearings, with respect to house bill 20 I frankly had no recollection of the vote. We voted on literally thousands of measures and that bill never went to the floor for a vote. I tended to remember with more clarity those measures which required a vote on the merits on the floor. Committee votes are something else: Technically speaking, you are not voting on the merits in a committee vote. You are voting to put it out of committee with a certain recommendation.

In the year 1970, as reflected in the newspaper articles which I eventually unearthed, house bill 20 was not a major issue at that time in terms of having much public attention, in terms of having many people at a committee hearing, in any other way. It was simply not a measure that attracted that much attention.

In addition, house bill 20 was destined never to go to the floor in the State senate. I think it was widely known and believed even when it was in committee that it would never emerge from the Republican caucus. The votes were never there. It was a dead bill.

Senator DENTON. Yes. Then it might be relevant to follow up: You stated that some change in Arizona statutes was appropriate, and "had a bill been presented to me that was less sweeping than H.B. 20, I would have supported that. It was not." You broke off, but you meant it was not introduced. Is that correct?

Judge O'CONNOR. That is correct.

Senator DENTON. Can you then remember why you did not support S.B. 216, which was a more conservative bill regarding abortion which was pending in the Senate Judiciary Committee after March 23, 1970, roughly a month before the committee's vote on H.B. 20?

Judge O'CONNOR. Senator Denton, was that Senator McNulty's bill, if you know?

Senator DENTON. The bill provided for therapeutic abortions in cases involving rape, incest, or the life of the mother.

I have just been informed that my time is up.

It was Senator McNulty's bill, yes.

May she finish the answer to this question, Mr. Chairman?

The CHAIRMAN. She may finish the answer to your question.

Judge O'CONNOR. Senator Denton, as I recall that bill it provided for an elaborate mechanism of counseling services and other mechanisms for dealing with the question, and I was not satisfied that the complicated mechanism and structure of that bill was a workable one.

Senator DENTON. OK. Thank you, Judge O'Connor.

With my time up, Mr. Chairman, I would ask unanimous consent that a speech I made on August 26, 1981 delivered in Birmingham, Ala., on the subject of adolescent pregnancy be made a part of the record on this because it deals with the subject.

Sir, I must respectfully submit that, considering the importance of the matters being questioned into, although I am a freshman Senator, relatively inexperienced, I feel quite frustrated that these matters have not been developed in my opinion to the degree required for such an important appointment as a lifetime appointment to the Supreme Court. I just would like to mention that to you at this time as my feeling.

The CHAIRMAN. All Senators had 15 minutes on the first round and 15 minutes on the second round, except Senator Simpson who is not here today for his second round and so waives it, and Senator Heflin who has stated he did not care for a second round, and Senator Robert Byrd, the distinguished minority leader, who has not had either round on account of his duties.

Senator, out of my great respect for you, I will call on Senator Byrd and then come back to you for an extra 15 minutes which will give you three 15-minute rounds, if that is agreeable.

Senator DENTON. It will certainly offer more opportunity, sir.

The CHAIRMAN. Senator Byrd of West Virginia.

Senator BYRD. Mr. Chairman, thank you.

I will be very glad to wait and let the Senator complete his line of questions. I have found that it is very important that a Senator be able to finish his line of questions without interruption. I thank you for allowing me to speak at this time but if the Senator would like to complete his questions, I can wait another 15 minutes. I have very little to say and I can say it in 2 minutes but I would be very happy to wait.

The CHAIRMAN. All right. Senator Denton, we will call on you now and give you an extra 15 minutes.

Senator DENTON. All right, sir. Thank you.

The complicated mechanisms to which you refer, Judge O'Connor, I would not think would be ruled out in view of the complexity of the issue and so forth. I would have thought that you would allow that those complicated mechanisms should be considered—in continuance of your remarks, as we were broken off.

Judge O'CONNOR. Senator Denton, again I would ask you to reflect on the fact that we are talking about the year 1970. That was a time when at least my perception as a State legislator in Arizona indicated that this subject was not the subject of the public attention and concern that it is today.

I did not perceive very much in the way of public support at that time for the invocation of expensive counseling machinery in connection with this area. It is simply something that was basically a new approach being suggested in the legislature and I was not satisfied at that time that that was an appropriate approach.

STARR MEMORANDUM

Senator DENTON. OK. You keep referring to the social awareness, and so forth, and yet I keep remembering your statement about constitutional principle. I believe that upon further reflection on your part you might see a connection, and I believe you may have already begun to see a connection between the constitutional provision for protection of life and due process maybe, and this issue, and certainly the statement in the Declaration of Independence, and so forth.

The Starr memorandum makes no mention at all of your April 23, 1974 vote against a House-opposed right-to-life memorial which called on the U.S. Congress to constitutionally protect the life of the unborn. Was that discussed with Mr. Starr? If not, why not?

Judge O'CONNOR. Senator Denton, I certainly believe that it was. That memorial was the subject of a good deal of concern. Of course, I have not seen the so-called Starr memorandum. I have seen references in the newspaper to it but I did not see it. If I am correct in your date, that is something that occurred after the nomination had been announced, or the selection, rather, had been announced by the President.

Senator **DENTON**. Well, since this memorandum is such an important issue with so many people and such an important issue bearing on the subject we are discussing, I would ask permission from the chairman to deliver this memorandum—a copy of it, it is relatively brief—to Judge O'Connor, sir, so that she can address——

The **CHAIRMAN**. The staff will deliver a copy of the memorandum to Judge O'Connor.

Senator **DENTON**. Mr. Chairman, I would respectfully request that a copy of the memorandum be placed in the record.

The **CHAIRMAN**. Without objection, it will be placed in the record.

[Material to be supplied follows:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 7, 1981.

Memorandum for the Attorney General.
From: Kenneth W. Starr, Counselor to the Attorney General.

On Monday, July 6, 1981, I spoke by phone on two occasions with Judge O'Connor. She provided the following information with respect to her public record on family-related issues:

As a trial and appellate judge, she has not had occasion to rule on any issue relating to abortion.

Contrary to media reports, she has never attended or spoken at a women's rights conference on abortion.

She was involved in the following legislative initiatives as a State Senator in Arizona:

> In 1973, she requested the preparation of a bill, which was subsequently enacted, which gave the right to hospitals, physicians and medical personnel not to participate in abortions if the institution or individual chose not to do so. The measure, Senate Bill 1133, was passed in 1973.
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> In 1973, she was a co-sponsor (along with 10 other Senators) of a bill that would permit state agencies to participate in "family planning" activities and to disseminate information with respect to family planning. The bill made no express mention of abortion and was not viewed by then Senator O'Connor as an abortion measure. The bill died in Committee. She recalls no controversy with respect to the bill and is unaware of any hearings on the proposed measure.
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> In 1974, Senate Bill 1245 was passed by the Senate. Supported by Senator O'Connor, the bill as passed would have permitted the University of Arizona to issue bonds to expand existing sports facilities. In the House, and amendment was added providing that no abortions could be performed at any educational facility under the jurisdiction of the Arizona Board of Regents. Upon the measure's return from the House, Senator O'Connor voted against the bill as amended, on the ground that the Arizona Constitution forbade enactment of legislation treating unrelated subject matters. In her view, the anti-abortion rider was unrelated to the primary purpose of the bill, namely empowering the University to issue bonds to expand sports facilities. Her reasons for so voting are nowhere stated on the record.
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> In 1970, House Bill 20 was considered by the Senate Committee on which Senator O'Connor then served. As passed by the House, the bill would have repealed Arizona's then extant criminal prohibitions against abortion. The Committee majority voted in favor of this pre-*Roe* v. *Wade* measure; a minority on the Committee voted against it. There is no record of how Senator O'Connor voted, and she indicated that she has no recollection of how she voted. (One Senator voting against the measure did have his vote recorded.)

Judge O'Connor further indicated, in response to my questions, that she had never been a leader or outspoken advocate on behalf of either pro-life or abortion-rights organizations. She knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her.

Senator **DENTON**. If I may, Mrs. O'Connor, I would ask you to read it because I am going to ask if you think that the memorandum could be characterized as a fair representation of your record on the abortion issue.

The CHAIRMAN. Now as I understand, this memorandum was made by Mr. Starr of the Justice Department——

Senator DENTON. Sir, I have no other——

The CHAIRMAN [continuing]. To the Attorney General. It was not made by the witness, Judge O'Connor. I just wanted to get the record straight on that.

Senator DENTON. It appears, sir, the dateline, the heading is "Office of the Attorney General, Washington, D.C., Memorandum for the Attorney General from Kenneth W. Starr, Counselor to the Attorney General." I have no——

The CHAIRMAN. Of course, Judge O'Connor is not responsible for what some member of the Justice Department wrote to the Attorney General.

Senator DENTON. Yes, sir, I totally agree.

The CHAIRMAN. However, we admit the memorandum for such consideration as it deserves.

Senator METZENBAUM. I wonder if the Senator from Alabama could make a copy of that memorandum available to other members of the committee, please.

Senator DOLE. Yes, sir. I have one other here so we could make a copy of it, Mr. Chairman.

The CHAIRMAN. Staff informs me that copies of the memorandum are being made available and will be handed around.

Senator Denton, you may proceed.

Senator DENTON. All right.

Judge O'Connor, as a lawyer, would you say that this memorandum could be characterized as being a fair representation of your record on the abortion issue?

Judge O'CONNOR. Senator Denton, it is somewhat incomplete. It does not reflect my vote in 1974 on the funding of medical care for the indigent, and so forth. I think it is not totally complete on that issue.

Senator DENTON. It has been represented or perceived by many that that memorandum, which many understand to have been the principal input to the President regarding your record, you might say is a bit optimistic from the standpoint of those who are prolife in its characterization of your record. That is why I brought it forward.

Judge O'CONNOR. Senator Denton, I can only comment——

The CHAIRMAN. If you will pardon me just a minute, now, Senator, if you are going to the process by which the President made his selection, that is one thing. The question we are considering here is her fitness for this position. I have no objection if you wish to ask the question but I want to emphasize this: that we, the members of this committee, will determine her fitness for this position and not the method by which the President went about making his selection. That was his business and not ours.

You may proceed.

Senator DENTON. Yes, sir, I totally accept that admonition.

Her statements in the memorandum are relevant to the issue of deciding where she stands or figuring out where she stands on this issue.

The CHAIRMAN. I think you can ask any question as to where she stands on the issues but as to what the President had in mind when he selected her, that is another question. I do not think that would be appropriate, for her to try to interpret or imagine what the President had in mind when he made this selection.

PARENTAL RIGHTS

Senator DENTON. Yes, sir. I do not remember asking her a question on that but I certainly will not.

On the issue of parental rights, there has been only one case in which the constitutional issues involved in parental notification for contraceptive services to minors have been considered. In that case, *Doe* v. *Irwin*, a Federal appeals court held that parents do not have a constitutional right to be notified of their daughter's decision to visit a State-supported family planning clinic, at which place she can be issued the contraceptives and so forth.

Do you believe that the Supreme Court acted properly in allowing this decision to stand by refusing to review the case?

Judge O'CONNOR. Senator Denton, the Court has had several occasions to consider the question of parental consent in the area of abortion or contraceptive availability and so forth. I would have to say that I think the questions in that area are still somewhat in doubt. I do not know that we have perceived the full range of what the Court's ultimate holdings will be.

The Court has indicated in the *Ginsberg* case back in 1958 that the Supreme Court has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society. I think that is an apt expression of the concern that has been expressed in the Court, and certainly the role of family values is very important in this area.

On the other hand, the Court in the *Danforth* case ruled unconstitutional, as you know, a statute requiring parental consent before an unmarried minor could obtain an abortion, but the Court did note in that case that it was not ruling that every minor was capable of giving effective consent, so it left the question very much open.

In the *Baird* case in 1979, the Court struck down a statute which required parental consent prior to the performance of an abortion but the Court did not agree in that case on a rationale, and I do not think we know what that might be. Certainly the *Matheson* case decided last year from Utah, to which Senator Hatch had referred, did uphold a requirement of notification to the parents.

It certainly is my hope that every young person faced with a decision whether to get an abortion, or indeed whether it is appropriate to get birth control supplies, would feel able and willing to discuss that with the parents and get parental guidance. That is my hope.

I know that in fact in some families that kind of relationship between parent and child simply does not exist. I suppose we all realize that that is one of the failings of our current society, that not every family functions in a way that facilitates that kind of communication.

Senator DENTON. However, where the family is in existence and the 13-year-old wants an abortion, would you be in favor of her being required under normal circumstances to have the parents notified, and so forth?

Judge O'CONNOR. Senator Denton, again without expressing a view that could be interpreted as my position on any legal issue that would come before the Court in connection with the subject of how far a statute can go in mandating parental consent, I would simply say that it is my personal view that I would want to have the child consult the parents and have the parents work with the child on that issue.

RIGHTS OF HOMOSEXUALS

Senator DENTON. In reconciliation, a bill which permits a child to go to a place where that procedure would be in effect was passed. Whether or not it is appropriate is going to be another question, so I am happy to hear that you are in favor of that. The other system of doing it gets 10 times as much money as the new one, where they do not have to ask the parent about anything. The parents are not brought in.

Do you believe there are any constitutional limitations on laws which might be passed by a State or the Federal Government forbidding homosexuality, homosexual practices, or limiting the rights of homosexuals because of their sexual deviance? For example, do you believe that Congress has the authority to make rules and regulations which establish that homosexuality is a cause for dismissal from Government jobs requiring security clearance, unless an honorable discharge from the military?

Judge O'CONNOR. Senator Denton, I can only say that the state of the law concerning homosexuality is, in one word, unsettled. I hardly know how to characterize the state of the law in this particular subject.

Back in 1977 in the *Carey* case, the Supreme Court indicated in a footnote that it had not yet definitively answered the difficult question whether and to what extent the Constitution prohibits State statutes regulating private consentual sexual behavior among adults. Then in the *Doe* case in 1976, a three-judge court had initially ruled on the question and then the Supreme Court simply summarily affirmed that lower court decision denying a challenge to a State criminal statute prohibiting sodomy.

Therefore, that is all we know I think at the moment on the Supreme Court holdings in that area. The cases concerning the rights of people who are homosexuals in connection with being deprived of a position as an employee or having custody of children are really very confused on the lower court level. Some of those cases are working their way up to the Supreme Court and, I think, pose some very unsettled questions on which the Court will indeed be asked to rule.

Senator DENTON. Thank you.

How much more time do I have, Mr. Chairman?

The CHAIRMAN. How much more time do you want, Senator? I want to accommodate you.

Senator DENTON. All right, sir.

The CHAIRMAN. Your time is up now but we will give you more time if you want it.

Senator DENTON. Finding out where she stands on other areas where abortion would be permissible than to save the life of the mother is an area of investigation which seems fruitless.

The CHAIRMAN. Would another 15 minutes suffice?

Senator DENTON. I do not know whether another month would do, Mr. Chairman.

The CHAIRMAN. Senator, would another 15 minutes allow you to complete your questioning?

Senator DENTON. Unless Judge O'Connor wishes to expand or describe in some kind of specifics what other areas she thinks abortion is not offensive or should be——

The CHAIRMAN. Senator, suppose we allot you another 15 minutes, which in all gives you a full hour of questioning.

Senator DENTON. Would you care, then, Judge O'Connor, to say anything further about what you mean by other areas in which abortion should be permissible other than to save the life of the mother?

Judge O'CONNOR. Senator Denton, I understand your concerns and frustrations and I hope that you appreciate my concerns and my hope not to prejudge matters that surely are going to come before the Court, if you see fit to confirm me for this nomination. I feel the same sense of frustration in part as you do in having to be somewhat careful about what I say because of the constraints which I feel legitimately exist. I understand your concerns, and I have tried to adhere to that line which has been indicated to me—in my review of previous hearings—has been followed generally by other nominees.

Senator DENTON. Well, as no lawyer, I cannot gainsay your stand that you are prejudicing the situation by giving specific answers on a position regarding your feelings as to the permissibility or morality or whatever of abortion other than to save the life of the mother. However, I will quote from the constitutional lawyer's comments which I have submitted previously for the record, and the chairman graciously, and the other members without objection, permitted.

He says that—

> One thing stands out supremely when a vacancy on the Supreme Court occurs. The replacement should be deliberate, not impulsive. The public interest is not served by a fait d'accompli, however politically brilliant. The most careful probing and the most measured deliberation are what are called for.

He maintains:

> Unhappily, the atmosphere surrounding the nomination to the Supreme Court is one almost of panic. Considering that the liberties of the American people can ride on a single vote in the Supreme Court, any politically or ideologically motivated impatience should be thrust aside and time taken to do the job right. Plainly there is no need for instantaneous confirmation hearings, and the most painstaking effort should be made to fully know the qualifications, including philosophy, of the candidate. My first plea would be, therefore, do not rush this nomination through.

I must admit the chairman has been more than careful to permit in this case all the time he chooses to give to my questioning. The problem is that I do not think I am getting the answers to which the next part of this gentleman's memorandum or paper refers.

He says:

> My second misgiving relates indeed to the matter of philosophy. Some zealous supporters of the O'Connor nomination, who themselves have notoriety as ideologues, have made the astonishing statement that on the Supreme Court of the United States ideology does not count. They say, in other words, that it should be of no significance that a candidate would have an actual and proven record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. Those concerns are not dispelled by a recital that the candidate is "personally" opposed to such a point of view. Why the qualifying adverb? Does that not imply that while the candidate may harbor private disgust over certain practices, he or she does not intend to forego support of those practices?

He maintains:

> Philosophy is everything in dealing with the spacious provisions of the first amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when in these vital areas of the Constitution there is really very little language to "strictly" construe. As to other areas of the Constitution, for example, article 1, section 4, "The Congress shall assemble at least once in every year," to speak of "strict construction" is also absurd since everything is already "constructed."

The more relevant thing that he says is that:

> Broad and bland answers could of course be given to each of these questions, but lack of knowledge or lack of specificity in answers would obviously be useful indices of the capabilities or candor of the candidate. Fair, too, and important would be questions to the candidate calling for agreement with, disagreement with, and discussion of major prior decisions of the Supreme Court. Not the slightest impropriety would be involved in, and much could be gained by public exposition of the candidate's fund of information on these cases, interest in the problems they have posed, and reaction to the judgments made. Even these few considerations make it clear that the Senate's next job is not to confirm Mrs. O'Connor but instead to find out who she really is, that is, what convictions she possesses on great issues. I thus return to my theme that deliberativeness, not haste, et cetera.

He ends by saying:

> Other vacancies may soon arise. The precedent of lightning-fast decisions in the matter of choosing our Supreme Court Justices would be a bad precedent indeed.

My only problem is that I do not feel I have made any progress personally in determining where you stand on the issue of abortion. I believe when you say "and there may be other matters," or issues, or however you stated that makes it totally vague, and therefore I find myself at a loss, considering this constitutional lawyer's opinion.

I have not determined your position, and William Bentley Ball seems to feel—that is the name of this gentleman—that it would have been desirable for you to comment on past Supreme Court decisions because in the future the precise case will not come up in that identical form. However, you have maintained that it would. I will have to defer to your position on that but I do so with regret because it makes it very difficult for me to understand where you are on that issue with which I was so concerned.

Thank you very kindly, Judge O'Connor, for your responsiveness. I have to respect your position on this. I must note that Alexander Haig took about a month to get through; Mr. Donovan in here did not receive quite the polite application of questioning that you have, but I do not regret politeness. I did not ask him any impolite questions either.

With that, Mr. Chairman, I conclude my questioning.

The CHAIRMAN. Senator, do you have any more questions you would like to propound?

Senator **DENTON**. I do not think they would be fruitfully put forward, sir.

The **CHAIRMAN**. I believe Senator Simpson, as I mentioned, is not here, and Senator Heflin has indicated he has no second round. Senator Byrd of West Virginia.

OPENING STATEMENT OF SENATOR ROBERT C. BYRD

Senator **BYRD**. Judge O'Connor, I have observed the hearings from afar, to an extent, and I have been aware of the subject areas of the questions that have been asked and aware of your responses to a considerable degree.

The fact that I have not been able to attend the hearings does not in any way demonstrate a lack of interest in your nomination. I told you several weeks ago that it was my intention to vote for your nomination unless something developed which I did not foresee and which might otherwise cause me to change my mind.

I have listened to the questions about how you stood on various bills and why you voted for or against various bills in the legislature 10 or 12 years ago. I do not know of any more difficult question that can be asked than "Why did you vote for H.R. 1476," or "Why did you vote against 1415," 10 years ago or in my case 30 years ago, in the State legislature. I do not know of any more difficult question that can be asked than "Why did you vote for or against this or that bill 2 years ago?"

If someone were to ask me why I voted for the Panama Canal treaties, I can answer that question. It was a very controversial issue at the time. There was a great deal of opposition to the treaties on the part of a lot of people who had never read them, and who perhaps have not read them yet today. It was a matter that was before the Senate for a considerable length of time, very heatedly debated, and one which I can respond to questions on on the spur of any moment.

However, there are many bills which we voted on, many votes we took last year which did not command my attention to the extent that I can, at the drop of the hat, answer why I voted for this or that amendment. Sometimes it is even difficult to remember that such and such an amendment was called up.

That is not to derogate those who ask such questions. It is simply to say for the record that it is asking almost for the impossible in some instances to expect a former legislator or a current legislator to relate the details of why he reached such and such a decision on such and such a bill at such and such a time.

As a former State legislator in both houses of the West Virginia Legislature, I voted on some issues there undoubtedly in a way that I would not vote today if I were a member of that legislature. I voted against the 1964 Civil Rights Act, and spoke I believe 16 hours against it; it may have been 14 hours.

However, I voted my conscience at that time, and I voted against the Voting Rights Act when it was first enacted, but I was in good company when I voted against those pieces of legislation. Sam Ervin, who is an acknowledged constitutional scholar, Senator Russell, and other Senate greats who were steeped in the Constitution, for constitutional reasons opposed those acts, both of them.

For what I thought to be sufficient constitutional reasons—not only sufficient but for compelling constitutional reasons—I voted against those pieces of legislation, spoke against them, but I have since changed my mind on the Voting Rights Act. I voted for its extension and intend to vote for its extension again. The Supreme Court has upheld the act. The great constitutional scholars who presented what I thought were irresistible arguments in opposition to those pieces of legislation apparently were wrong, and I feel that I was wrong in voting against the 1964 Civil Rights Act.

Therefore, I think that is the position that you are in as a former legislator, and I have to take cognizance of those difficulties when it comes to answering the kinds of questions that have been asked of you. Again, I cast no aspersions or reflections on the Senators who are asking those questions. They are conscientiously pursuing a line of questions that they feel is necessary in order to put to rest certain concerns that they have.

Also, I can appreciate the fact that one's personal views need not be compelling when it comes to interpreting the Constitution. Your function will be to interpret the Constitution and to apply that interpretation or construction to the sets of facts that are before you from time to time.

I can appreciate the fact that you may personally have a feeling on this or that subject but, when it comes to interpreting the Constitution, you are not supposed to let your own personal biases, prejudices—if that is what they may be—enter in to it. I can say that in my case I do not claim to be one who is without some biases and prejudices but, if I were attempting to interpret the Constitution and construe it and apply it, I do not think I should let my personal feelings intervene. I think it would be my reponsibility under my oath to do the very best I could to avoid letting my own personal feelings sway my judgment.

It may be impossible. Perhaps one's subconscious feelings, his personal feelings may come through. However, I respect the position you have taken. Perhaps your personal views on many of these things do not parallel my own, but I have faith that you are going to attempt to interpret that Constitution and construe it and apply it in accordance with the oath which you will take, and that you will not let your personal views be the determining factor, difficult though it may be at some times.

STARE DECISIS

I can also understand the desire of Senators to understand what your philosophy is. For a long time I felt that the Supreme Court of the United States was a permanent constitutional convention and that it was setting itself up as a higher legislature than Congress. Therefore, from that standpoint I am interested in what your philosophy is, but it will go only to this extent: What is your philosophy, if I may use that word, with respect to the subject of stare decisis?

I understand that others have brought up the subject, and it seems to me that that is one of the very important questions that should be asked. Recognizing the difficulty in answering it to the satisfaction of any given Senator, I still would like to ask it again.

Just how much weight will you give to former precedents of the Supreme Court? I do not think that I would have been critical of the Supreme Court of the United States in the recent past if I had felt that the Justices on that Court were adhering to the doctrine of stare decisis a little more closely than what they apparently, to me at least, were demonstrating.

How do you feel about that doctrine? Is it going to be a doctrine that will be a supervening one, one that you will be always conscious of as you deal with cases that come before the Court? Just how will you be guided by previous decisions and by the previous precedents that have been laid down by the Court?

Judge O'CONNOR. Senator Byrd, I have addressed this same question previously, as you were aware, and will characterize again my thoughts on this concept.

The doctrine of stare decisis is a very significant and important one for the judicial system in our country. Indeed, it is a very basic concept in our system. The reason for it, of course, is to give predictibility and stability to the law, an effort so that the public generally and other judges can be guided by the knowledge that the law in a certain area has been decided. Indeed, as one previous famous judge has indicated, sometimes it is better that the law be decided than that it be decided correctly.

On the other hand, all appellate courts have recognized that there are instances when the judges become convinced in their own minds that a previous decision was decided incorrectly or was based on some flawed understanding of the previous judges of the issues or principles involved. We have examples throughout our system of instances in which a subsequent case has overruled a previous holding, so it happens. It happens perhaps not frequently but it occurs, and it is appropriate that it can occur.

Certainly, as Justice Cardozo pointed out, if we approached every case on a case-by-case basis the law would be hopelessly confused and the administration of justice would be impossible. We do not do that, but at the constitutional level there have been indications that only if the Court has the capacity to change its mind, if you will, on the correctness or principles of a previous decision, is it possible for an erroneous interpretation of the Constitution to be corrected. It is either that, or we amend the Constitution.

Therefore, we have instances in the Court's history, of the U.S. Supreme Court, in fact approaching perhaps 150 such instances in the Court's history in which the Court has in effect overturned a previous decision. We have, I think, an indication from the Court that in the case of statutory interpretation—for instance, when the Court has occasion to rule on the interpretation of a statute enacted by Congress—if indeed that interpretation is erroneous the Congress itself can take appropriate action, presumably, to make corrections. Therefore, the doctrine of stare decisis might indicate that one would be very much more reluctant to change.

I think in essence that sets forth my understanding of the concept.

Senator BYRD. Well, do I understand you to say that while you recognize that new precedents have to be set and that from time to time the Court has to reverse previous precedents, that nonetheless the doctrine of stare decisis is a sound one and that it establishes a principle that you will constantly keep in mind, and as much as possible adhere to where the circumstances permit?

Judge O'Connor. Senator Byrd, it is an important and a sound concept in my view and one which will always be appropriately considered. Only when the judge or justice becomes convinced in his or her own mind that something was previously incorrectly resolved and that there are sufficient reasons for reaching a contrary result, would that obtain, but this is a very serious business.

Senator Byrd. Judge O'Connor, I think that we strict constructionists should feel very comfortable with that response. I am applying the term to myself, and I feel very satisfied with it. If I had been able to express it so eloquently and so succinctly as you, were I in your position, I would have said just what you said.

I think your responses reflect that you have been well prepared. I think they have indicated on your part a juridical approach to the questions. You have I think been as forthright as one can be and you have been honest, in my judgment, in your responses. You have at all times been conscious of the fact that you cannot go beyond a certain line in responding to questions, lest once you have been confirmed you would find you have created difficulties for yourself, in which case you either would have to act in a way that left others thinking that you broke your word, or on the other hand you would have to be untrue to yourself.

I compliment you. I think you have demonstrated the demeanor and the bearing that a Justice should have, and I intend to support your nomination enthusiastically. I congratulate you, and I will do everything I can to expedite the Senate confirmation of your nomination once it is reported from this committee.

Judge O'Connor. Thank you, Senator Byrd.

Senator Byrd. Thank you, Mr. Chairman.

The Chairman. Senator, do you have any other questions? Senator Byrd, do you have any other questions?

Senator Byrd. No.

The Chairman. Do you wish to confess any other errors of the past? [Laughter.]

Senator Leahy. Mr. Chairman, if that happens you will find the attendance will really swell around here. [Laughter.]

The Chairman. Does any other Senator have——

Senator Byrd. Mr. Chairman, will you allow me to respond to that question? [Laughter.]

I have heretofore confessed to those errors, so it is not a matter of news but simply a matter that I thought was appropriate for this record in this particular instance.

The Chairman. Does any other Senator now request any additional time? We gave the Senator from Alabama additional time and we want to be fair to all Senators. Does any other Senator request any additional time on either side?

Senator Biden. Mr. Chairman, I would like 60 seconds to make a comment.

The Chairman. The Senator from Delaware.

Senator Biden. Mr. Chairman, I think that the line of questioning about the nominee's personal views on abortion is appropriate and has been appropriately directed to her. I think her distinction between her personal views and what she would or would not do as a Justice of the Supreme Court is equally appropriate.

If I can make an analogy, I think it would be appropriate for us to ask the Justice, were it an issue, what her view on membership in the Nazi Party would be and whether or not that should disqualify her from the bench—and that is not an issue in that case, but to make the analogy—but it would be inappropriate for us to ask her how she would vote as a Justice of the Supreme Court on the Nazi Party marching through Skokie, Ill., or whatever the suburb was. I think it would be inappropriate to ask her to comment on that but I do think it would be appropriate, were it an issue of the day as abortion is, to ask her what her personal view would be on whether or not she should or should not be a member of the American Nazi Party.

Therefore, I think you have made the distinction well. I want to publicly compliment my colleagues. I must make a public confession also. I was not at all sure that there was going to be the judicial demeanor and the good manners and the good conscience displayed by some of my friends who are characterized by the press and me as the New Right. I compliment them on their demeanor. I think their questions were appropriate. I think they conducted themselves well, did justice to themselves and the committee, and that your answers were equally judicious and appropriate.

The CHAIRMAN. Does any other Senator have any further questions?

Senator DOLE. Mr. Chairman, if I may just comment, I think Senator Biden has done pretty well, too. [Laughter.]

The CHAIRMAN. Does any other Senator have any other questions?

Senator LEAHY. Mr. Chairman, was the Senator from Kansas asking for a vote on that last observation? [Laughter.]

Senator DOLE. I would not want to have a vote on Senator Biden. It would be too close. [Laughter.]

The CHAIRMAN. Senator Denton, did you want any additional time now?

COMMITTEE REPORT

Senator DENTON. No, sir. I would request that a written record be made, a written report, of these proceedings. Is that in order?

The CHAIRMAN. Well, all of this will be printed.

Senator DENTON. A report written by the committee staff is the request I am making, which I understand is distinct from the normal transcript and so on.

The CHAIRMAN. The entire hearing will be printed and reported, and the committee's report will be prepared by the staff. If you have any questions, why, you feel free to get in touch with the staff.

If we finish this hearing today, which I think we will do, then we will place this nomination on the calendar for Tuesday. Of course, any member can carry it over a week if he wants to, but at the same time we wish to expedite it and to get action as soon as convenient.

Senator **Denton**. Sir, I was informed that there is a provision when you have a committee report for including supplementary views, and that was the reason for my request.

The **Chairman**. That is correct. Any Senator who wishes to state supplementary views to the majority of the committee report will have the opportunity to do so.

If no other Senator has any other questions now, we are going to excuse Judge O'Connor.

COMMENDATION OF WITNESS

Judge O'Connor, before you leave I want to say that the committee as a whole I am sure has been deeply impressed with your intellect and with your candidness, with your capacity, with your dedication. We feel if the Senate confirms you here that you will make an outstanding Associate Justice of the U.S. Supreme Court.

Judge **O'Connor**. Thank you, Mr. Chairman, and thank all the members of the committee and you for the courtesy shown to me during these proceedings. I appreciate that very much.

The **Chairman**. We will now hear from other witnesses. The next witness is the Governor of Arizona, the Honorable Bruce Babbitt, if he will come around and take the witness stand.

Governor Babbitt of Arizona, will you stand and be sworn?

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Governor **Babbitt**. I do.

The **Chairman**. Have a seat. Governor, we will be glad to hear any statement you wish to make.

TESTIMONY OF HON. BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA

Governor **Babbitt**. Mr. Chairman, committee members, it is a great honor for me to appear before you as Governor of Arizona to testify on behalf of the President's nomination of Judge O'Connor.

I have a written statement which I will submit for the record, and in lieu of reading that I would like to simply summarize briefly a few thoughts about this nomination.

The committee has heard and will continue to hear from many witnesses who will testify to Judge O'Connor's exemplary skills as a legislator, a judge, a lawyer, legal scholar, community leader, and family leader. I do not intend to cover that ground. I believe that even those who are appearing in ostensible opposition to this nomination concede her exemplary character, intellect, and personal qualifications to be confirmed to the Supreme Court of the United States.

In lieu of that I would like briefly to cover two other subjects: The first, why it is that I appointed her to the Arizona Court of Appeals several years ago; and, second, what I believe this nomination means to the Governors of the 50 States of this federal Union.

The name of Judge O'Connor came to me in October 1979 as one of three names on a merit selection list from which I had complete discretion to name a judge for the appellate court vacancy. Now I found myself at that time on ground somewhat similar to that occupied by Reverend Falwell, Dr. Gerster, and others. Judge O'Connor had a splendid and productive career as the leader, the legislative leader of the Republican Party in Arizona. I was a Democratic Governor. The other two names on the list were distinguished and qualified Democrats.

I had occasion to consider how it is that a decision of this type is made, and I had occasion to reflect on the fact that we had been not infrequently political opponents. I had occasion to reflect on the thousands of votes that she had cast as a member of the Arizona Legislature, a good many of which I took exception with.

It quickly occurred to me that however appropriate it may be to compile a scorecard of votes taken on the many and diverse issues that confront a legislator, however appropriate it might be to do that to elect or judge a Governor or a Senator, that the appointment of a judge was a manifestly different process. It was not a political process of compiling scorecards, and I submit then and now that there are two considerations, considerations which I applied.

The first and obvious one is the character, intellectual ability, and judicial temperament of the candidate. I believe those issues have been covered. They are obvious. I felt then and now that from the written record and from the testimony you will hear, that she possesses those in ample quantity beyond any conceivable doubt.

The second legitimate question that I posed prior to making that appointment was this issue of judicial philosophy, an important one, an important one to me as Governor. I believed then and now that Judge O'Connor is a judicial conservative, and I use "conservative" in the old and true and institutional sense of that word, a quality I think perhaps best expressed in the decisions of Justice Frankfurter, a quality that perhaps has been missing in recent decades, or at least not fully present in recent decades in the U.S. Supreme Court and elsewhere in this land.

I believed then and now that she possesses the qualities of a judicial conservative, with all of the implications that that phrase has as we enter into a new decade where this issue of federalism, of the role of the three branches of government and the interplay between Federal and State governments is rapidly coming to the fore as one of the great and important issues of our time.

Lastly, Mr. Chairman, committee members, I would like to suggest what this nomination by the President means to the 50 Governors of this Republic, partners in this federal system mandated by the Constitution of the United States. I believe I speak for all of the Governors of this Union when I say that, like the President himself, we have become increasingly concerned about the status and the quality of the federal system.

Like the President, we have come to believe with increasing strength and conviction that the system has become unbalanced, that the Federal side of the system over the last few decades—through judicial activism, through activism in the U.S. Congress—has tipped to the point of eroding this fine balance that was contemplated by the drafters of the Constitution.

Believing that, I believe that the Governors of this Nation take great encouragement and great heart in the President's nomination of Judge O'Connor. We recognize as, Mr. Chairman, you yourself pointed out several days ago, this is the first time in 24 years that a Justice nominee has come before this committee with a background in the administration of a State court system, the only judicial forum in this constitutional Republic where all of the matters of daily life and business and social intercourse are fit and proper subjects for judicial resolution under our Constitution.

We take heart in the fact that for the first time in 42 years a candidate comes before this committee with legislative experience, again, legislative experience on the front lines in a forum under our Constitution where all the matters of daily life are presented as issues of first import, of general import, without the restrictions that inevitably attend consideration of these issues at the Federal legislative or judicial level.

It is for this reason, Mr. Chairman, that I believe the President has uniquely selected a nominee for this season in our constitutional and legal history. It is for this reason that I recognize with many of you that this is indeed a historic occasion, and I simply urge this committee to confirm the President's nomination unanimously.

Thank you very much.

The CHAIRMAN. Thank you, Governor.

Are there any questions by any member of the committee?

Senator BIDEN. I have one question.

The CHAIRMAN. The Senator from Delaware.

Senator BIDEN. Governor, thank you. It is good to see you again. My only question is, How many more Arizona residents do you have ready for us for the Supreme Court? [Laughter.]

Governor BABBITT. There are more in line, Senator.

Senator BIDEN. Nice of you to come, Governor.

Governor BABBITT. Thank you.

Senator DECONCINI. Mr. Chairman?

The CHAIRMAN. The Senator from Arizona.

Senator DECONCINI. Mr. Chairman.

Thank you, Governor Babbitt, for being here. I know with the business of your office, the reapportionment that is under way and different things, to take the time to come out here——

Governor BABBITT. Senator DeConcini, excuse me. Let me assure you that your district is safe. [Laughter.]

Senator DECONCINI. That was the question: I wanted to be sure that you were not trying to make three Senators.

I want to point out to the committee that Governor Babbitt has established a policy for some time, since he has been in office and even before when he was an attorney general, to select judges on their merits. He has appointed a number of Republican judges to the appellate court and the superior court in Arizona, Sandra O'Connor being only one—obviously an outstanding example for all State Governors and one that I truly believe the President looked at closely in his selection process.

I am very proud that Arizona has been able to step out of the political arena of selecting judges. Indeed, Governor Babbitt deserves the great credit. I wanted to call that to the attention of my colleagues here and for the record.

Thank you, Governor.

Governor BABBITT. Thank you, sir.

The **Chairman**. Governor, congratulations on selecting judges on their merit, including the Republicans. [Laughter.]

If there are no other questions, we will now excuse you. Thank you very much for your appearance.

Governor **Babbitt**. Mr. Chairman, thank you.

[Material follows:]

Statement submitted by
Arizona Governor Bruce Babbitt
to Senate Judiciary Committee
September 11, 1981

Mr. Chairman, Members of the Senate Judiciary Committee:

I am honored to appear before this Committee to testify on behalf of Judge Sandra Day O'Connor as President Reagan's nominee to the United States Supreme Court.

This Committee will hear from many witnesses regarding Judge O'Connor's outstanding record as student and law review editor, her exemplary family life, her achievements as a State Legislator and Senate Majority Leader, Prosecutor, private practitioner, Assistant State Attorney General, Trial Court Judge, Appellate Court Judge, and community leader. The richness, diversity and depth of her experience and her impeccable character have been attested by all, even those who appear in ostensible opposition to her nomination.

I appear today sharing some common ground with Reverend Falwell, Dr. Gerster and Mr. Lofton for I too have had my differences with Judge O'Connor. Prior to becoming a judge, Mrs. O'Connor served as the Republican Majority Leader of the Arizona Legislature. I am a Democrat.

Two years ago, in October of 1979, I had occasion to reflect seriously on our political differences when her name appeared on a list of three lawyers, two Democrats and one Republican, submitted to me by a merit panel for a seat on the Arizona Court of Appeals. Under the Arizona Constitution, I had complete discretion to select from that list. I selected Mrs. O'Connor despite the fact that I did not share many of her political views. I selected her even though I could find fault with some or even many of the thousands of votes she had cast during her legislative career.

It occurred to me then that compiling a scorecard of legislative votes may be the correct way to select a Senator or a

Governor. But it is manifestly the wrong way to select a judge. The judicial function is distinctive, separate and apart from the legislative function. The judge's job is not to compile a scorecard for review by the Americans for Democratic Action or the Americans for Constitutional Action; it is to defend and interpret the Constitution and laws of the United States.

The criteria that I applied to select Mrs. O'Connor over two fellow Democrats were essentially two. First, does she possess the necessary traits of intellect, character, legal excellence and judicial temperament? The answer was and is, yes, clearly manifest by both the paper record and the witnesses before this Committee.

The second proper question is whether she possesses a judicial philosophy acceptable to those who make the appointment. My answer to that question was again, yes. Mrs. O'Connor is a judicial conservative in the older and institutional meaning of that word, the meaning best expressed for me in the opinions of Justice Frankfurter. She has a strong sense of the tripartite nature of American government, of the delicate lines between judicial construction and judicial invention, and a feeling for the inherent limits within which the branches of government must function if we are to maintain that balance and tension that preserves our liberties and makes government work.

I would suggest one reason why this nomination has been received so enthusiastically by the Governors of the 50 states. Like the President, the Governors believe that our Federal system, that two-tier division of powers between the national government and the states, has in recent decades become seriously unbalanced. A great deal of the erosion of our Federal system can be laid directly at the feet of the United States Congress. However, much of the problem also lies with the United States Supreme Court. The Court in pursuit of worthy goals has not infrequently extended the reach of Federal power in ways that have compromised and undermined the ability of state courts, state legislatures and Governors to carry out the responsibilities assigned to them by the Constitution.

Many of us who believe that the time is now at hand to re-examine these issues of constitutional ends and means are greatly encouraged by this nomination.

Judge O'Connor is the splendid product of a new generation of state and local leaders who know the Constitution, who advocate good and competent government, who believe in civil rights and whose motives are untinged by racism, and who also understand what John Dickinson meant when he compared the Federal system to a Newtonian solar system, "in which the states were the planets and ought to be left to move freely in their proper orbits."

As your Chairman has pointed out, for the first time in 24 years a nominee for the Supreme Court comes before this Committee with experience gained in the turbulent front lines of a state court, the only courts of general jurisdiction in this Republic. And for the first time in 42 years, a candidate appears before this Committre with experience in a state legislature, the only forums in this Republic where all the great and mundane matters of daily life and business surface to be debated and acted upon. However divergent this rich and variegated experience may be from more common entry points, such as Wall Street, the Justice Department and the Federal bench, I believe that the Supreme Court, its judicial business and our aspirations for a renewal of the Federal system will be greatly enhanced by the addition of Sandra Day O'Connor.

The CHAIRMAN. We will now ask the distinguished mayor of the city of Phoenix, the Honorable Margaret Hance, and a member of the Arizona Board of Regents, the Honorable Jim McNulty, to come forward.

On account of the constraints of time, we are going to have to stop the witness after 5 minutes. The blue light means your time has started; the yellow light means you have 1 minute left; the red light means your time is up and you have to stop. Our time is limited.

We thank you for coming. Would you hold up your right hands and be sworn?

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mayor HANCE. I do.

Mr. MCNULTY. I do.

The CHAIRMAN. Have a seat. We would be glad to hear from you.

TESTIMONY OF HON. MARGARET HANCE, MAYOR OF THE CITY OF PHOENIX

Mayor HANCE. Thank you, Mr. Chairman, members of the committee.

Mine has been a close and friendly relationship with Judge O'Connor since we first met more than 20 years ago. I feel that I know her very well. We have been active together in many projects, and she has been a representative in various community activities concerning the government and welfare of the people of Phoenix.

These items give me the necessary showing of formal connection but that is not really why I am here. Judge O'Connor and I have been friends for many years. I like her. I respect her, and I know her to be a good person.

Perhaps the most obvious and most important observation that I can make is, for the great office to which the President has called her, any appointee must have unimpeachably good character. Judge O'Connor has unimpeachably good character.

In a world in which it is so easy to be mean and so few are kind, I have never heard anyone reflect with one word on Judge O'Connor's integrity. If the first quality for public service is character, then you have a first-quality person here.

The second major quality is ability. I am not technically competent to appraise Judge O'Connor's work as a lawyer, and I leave that to others. I am, however, competent to observe that in the many activities in which we have worked together she has been superbly effective. She organizes the job. She does not waste time. She effectively enlists the help of others. She gets the job done.

I suspect that Judge O'Connor is a tough judge but also a fair one. I am sure that she brings to the task of judging the quality of human sympathy and compassion for others. There is not a mean streak in her, but that is not enough. She has an affirmative desire to help, to be kind where she can be kind, and to be generous where generosity is possible.

I expect that this spirit of comfortable rather than overbearingly good citizenship comes from her comfortable family life. I know her in her roles as wife ~~and mother~~, and our community regards her as a model of both.

I think also in the zeal of her friends to portray Judge O'Connor for what she is—a very splendid choice for this high office—we may overlook a very human quality. Judge O'Connor also happens to have a very lively sense of humor, a fine sense of proportion, and a total lack of ostentation. As we used to say in the schoolyard, she is not "stuck up." I think her fellow judges will find her easy to get along with, and I think that is important, a valuable quality in a court of nine.

One last observation: Judge O'Connor has repeatedly shown that she can take on matters which are new to her and quickly master them. In the cliche of the day, she is a quick study. I have seen her, on city affairs, time after time become involved in matters with which she could not have been acquainted earlier but when she is through, she knows her subject inside out. I suppose the legislative experience contributes to this but perhaps that is why she was a good legislator to begin with.

Federalism has been mentioned. I would also like to add that when she was in the legislature Judge O'Connor was extremely helpful in providing local government with the tools we need to help our citizens. I applaud—as Senator Laxalt knows from his Federalism Commission—I applaud and I really cheer the perspective of someone who favors problem solving at the local level of government, that jurisdiction which is closest to the people.

I would like to say one last and highly personal word about the special plus factor which gives me such extraordinary satisfaction. I happen to have the honor of being one of the few women mayors in the major cities of America. ~~Women are~~ making their mark in Congress and the State legislatures, and at the lower levels of the Federal court system, but everyone in this room knows that this is an epoch-making occasion, this nomination of the first woman Justice. As a woman in public service, and on behalf of women everywhere, I express great pride and honor in being invited to testify on this very great occasion.

I have a vivid illustration, to illustrate the universality of this feeling. On the morning that the White House called me to notify me of the nomination, I started to get on the phone to congratulate my old friend. I found that to be absolutely impossible. You could not even dial the last number. After 4 hours I gave up trying, so I decided to send her a telegram. As I was dictating it to this young operator, the first two words were, "I am ecstatic," and the young woman interrupted me and said, "Oh, boy, so am I."

Thank you.

The CHAIRMAN. Thank you very much. We are delighted to have you with us, Mayor Hance.

[Statement follows:]

TESTIMONY OF MAYOR MARGARET HANCE
BEFORE THE SENATE JUDICIARY COMMITTEE HEARINGS
SEPTEMBER 9-11, 1981

MY NAME IS MARGARET HANCE. I HAVE BEEN THE MAYOR OF THE CITY OF PHOENIX SINCE 1976. PRIOR TO THAT TIME I WAS A MEMBER OF THE CITY COUNCIL. I HAVE BEEN ACTIVE IN CIVIC AFFAIRS AS A VOLUNTEER FOR MORE YEARS THAN I CARE TO REMEMBER.

MINE HAS BEEN A CLOSE AND FRIENDLY RELATIONSHIP WITH JUDGE O'CONNOR SINCE WE FIRST MET MORE THAN TWENTY YEARS AGO. I FEEL THAT I KNOW HER WELL. WE HAVE BEEN ACTIVE TOGETHER IN MANY PROJECTS, AND SHE HAS BEEN A REPRESENTATIVE IN VARIOUS COMMUNITY ACTIVITIES CONCERNING THE GOVERNMENT AND WELFARE OF THE PEOPLE OF PHOENIX.

THESE THINGS GIVE ME THE NECESSARY SHOWING OF FORMAL CONNECTION, BUT THAT IS NOT REALLY WHY I AM HERE. JUDGE O'CONNOR AND I HAVE BEEN FRIENDS FOR MANY YEARS. I LIKE HER. I RESPECT HER. I KNOW HER TO BE A GOOD PERSON.

LET ME BEGIN WITH THE MOST OBVIOUS BUT I THINK THE MOST USEFUL OBSERVATION I CAN MAKE: FOR THE GREAT OFFICE TO WHICH THE PRESIDENT HAS CALLED HER, ANY APPOINTEE MUST HAVE UNIMPEACHABLY GOOD CHARACTER. JUDGE O'CONNOR HAS UNIMPEACHABLY

GOOD CHARACTER. I HAVE NEVER IN A WORLD IN WHICH IT IS SO EASY TO BE MEAN AND TOO FEW PEOPLE ARE KIND, HEARD ANYONE SAY A WORD REFLECTING ON JUDGE O'CONNOR'S INTEGRITY. IF THE FIRST QUALITY FOR PUBLIC SERVICE IS CHARACTER, THEN YOU HAVE A FIRST QUALITY PERSON HERE.

THE SECOND MAJOR QUALITY IS ABILITY. I AM NOT TECHNICALLY COMPETENT TO APPRAISE JUDGE O'CONNOR'S WORK AS A LAWYER, AND I LEAVE THAT TO OTHERS. I AM, HOWEVER, COMPETENT TO OBSERVE THAT IN THE MANY ACTIVITIES IN WHICH WE HAVE WORKED TOGETHER, SHE HAS BEEN SUPERBLY EFFECTIVE. SHE ORGANIZES THE JOB. SHE DOES NOT WASTE TIME. SHE EFFECTIVELY ENLISTS THE HELP OF OTHERS. SHE GETS THE JOB DONE. I HAVE NEVER KNOWN JUDGE O'CONNOR TO LAY DOWN A TASK UNFINISHED.

I SUSPECT THAT JUDGE O'CONNOR IS A TOUGH JUDGE THOUGH A FAIR ONE. AT THE SAME TIME, I AM SURE THAT SHE BRINGS TO THE TASK OF JUDGING THE QUALITY OF HUMAN SYMPATHY AND COMPASSION FOR OTHERS. THERE IS NOT A MEAN STREAK IN HER, BUT THIS IS NOT ENOUGH. SHE HAS AN AFFIRMATIVE DESIRE TO HELP, TO BE KIND WHERE SHE CAN BE KIND, TO BE GENEROUS WHERE GENEROSITY IS POSSIBLE. SHE HAS AN INCREDIBLE RECORD, STRETCHING OVER ALMOST A QUARTER OF A CENTURY, OF CONCERN

FOR PEOPLE WHO NEED HELP AND OF FINDING WAYS TO PROVIDE THAT HELP.

I EXPECT THAT THIS SPIRIT OF COMFORTABLE RATHER THAN OVERBEARING GOOD CITIZENSHIP COMES FROM A COMFORTABLE FAMILY LIFE. I KNOW JUDGE O'CONNOR IN HER ROLES AS WIFE AND MOTHER. OUR COMMUNITY REGARDS HER AS A MODEL OF BOTH. THE CHILDREN ARE FINE YOUNG PEOPLE BECAUSE THEY COME FROM A LOVING HOME.

IN THE ZEAL OF HER FRIENDS TO PORTRAY JUDGE O'CONNOR FOR WHAT SHE IS, A VERY SPLENDID CHOICE FOR THIS HIGH OFFICE, WE MAY OVERLOOK A VERY HUMAN QUALITY. JUDGE O'CONNOR BRINGS TO LIVING A LIVELY SENSE OF HUMOR, A SENSE OF PROPORTION, AND A TOTAL LACK OF OSTENTATION. AS WE USED TO SAY IN THE SCHOOL YARDS, SHE IS NOT "STUCK UP." HER FELLOW JUDGES WILL FIND HER EASY TO GET ALONG WITH AND THIS, I SUSPECT, IS A VALUABLE QUALITY IN A COURT OF NINE.

ONE LAST OBSERVATION. JUDGE O'CONNOR HAS REPEATEDLY SHOWN THAT SHE CAN TAKE ON MATTERS WHICH ARE NEW TO HER AND QUICKLY MASTER THEM. IF I MAY USE THE CLICHE OF THE DAY, SHE IS A QUICK STUDY. I HAVE SEEN HER ON OUR CITY AFFAIRS TIME AFTER TIME BECOME INVOLVED IN MATTERS WITH WHICH SHE COULD

NOT HAVE BEEN ACQUAINTED EARLIER, BUT WHEN SHE IS DONE, SHE KNOWS HER SUBJECT INSIDE OUT. I SUPPOSE THE LEGISLATIVE EXPERIENCE CONTRIBUTES TO THIS, BUT PERHAPS THIS IS WHY SHE WAS A GOOD LEGISLATOR TO BEGIN WITH. I WOULD ALSO LIKE TO ADD THAT, WHEN SHE WAS IN THE LEGISLATURE, JUDGE O'CONNOR WAS EXTREMELY HELPFUL IN PROVIDING LOCAL GOVERNMENT WITH THE TOOLS WE NEED TO HELP OUR CITIZENS. I APPLAUD THE PERSPECTIVE OF SOMEONE WHO FAVORS PROBLEM-SOLVING AT THE LOCAL LEVEL OF GOVERNMENT--THAT JURISDICTION WHICH IS CLOSEST TO THE PEOPLE.

LET ME SAY ONE LAST AND HIGHLY PERSONAL WORD. THERE IS A SPECIAL PLUS FACTOR WHICH GIVES ME EXTRAORDINARY SATISFACTION. I HAVE THE HONOR OF BEING ONE OF THE FEW WOMEN MAYORS IN THE MAJOR CITIES OF AMERICA. WOMEN ARE MAKING THEIR MARK IN CONGRESS, IN THE STATE LEGISLATURES, AND AT THE LOWER LEVELS OF THE FEDERAL COURT SYSTEM.

YET EVERYONE IN THIS ROOM KNOWS THAT THIS IS AN EPOCH-MAKING OCCASION FOR THIS IS THE NOMINATION OF THE FIRST WOMAN JUSTICE IN THE HISTORY OF THE UNITED STATES. AS A WOMAN IN PUBLIC SERVICE AND ON BEHALF OF WOMEN EVERYWHERE, I EXPRESS GREAT PRIDE AND HONOR IN BEING INVITED TO TESTIFY ON THIS VERY GREAT OCCASION.

I HAD A VIVID ILLUSTRATION OF THE UNIVERSALITY OF THIS HAPPY SENSE WHEN THE WHITE HOUSE CALLED ME TO TELL ME OF THE APPOINTMENT. I IMMEDIATELY TRIED TO REACH MY OLD FRIEND ON THE PHONE TO CONGRATULATE HER, BUT THE CAUSE WAS HOPELESS; EVERYONE ELSE WAS DOING THE SAME THING. FOUR HOURS LATER I DECIDED TO SEND HER A TELEGRAM WHICH I BEGAN DICTATING TO AN OPERATOR. MY MESSAGE STARTED, "I AM ECSTATIC . . ." AND THE YOUNG WOMAN INTERRUPTED TO SAY, "OH BOY, SO AM I!"

The CHAIRMAN. We will now hear from Mr. McNulty.

TESTIMONY OF JAMES McNULTY, MEMBER, ARIZONA BOARD OF REGENTS

Mr. McNULTY. Mr. Chairman, members of the committee, may it please the committee, I am James McNulty, a real country lawyer in a community that seems to have an extraordinary number of like claimants. I am a private citizen, here at my own expense, from a copper mining camp in Arizona on the mountains of the Mexican border, Bisbee, my home for the last 31 years.

Not long ago I had the opportunity of serving in the Arizona State Senate for three terms, terms that overlapped the service of Judge O'Connor in the same body. My testimony is based on that service, on the very close relationships in such a small group, only 30 persons, and relationships built up in the close and sometimes fierce atmosphere of legislative activities.

I want to address an area important to me and one unaddressed by the publicity I have seen thus far touching upon this important nomination.

In 1972, Judge O'Connor led a successful legislative effort to move the noncriminal problems of alcoholism out of the criminal justice system. It was a progressive and thoughtful bill aimed at America's principle drug problem, alcohol.

It freed highly trained officers and expensive equipment and massive blocks of judicial time from the pathetically monotonous chores of booking, fingerprinting, photographing, arraigning, and sentencing public drunks. It put these unfortunates into a program where they are exposed to expert remedial help, and where some began better lives and began feeling better about themselves.

Today in Arizona there is no crime of being drunk in public, but there is a speedy trip to a so-called local alcoholism reception center, a trip that marks the beginning and the end of the role of the police and all the rest of the law-enforcement apparatus.

The legislation incorporated uncommon vision, hard-headed realism, and high legislative skill. It addressed a corrosive problem on its own terms, and that lengthy law was unconcerned with what I would call orthodox trivialities. It deserves national attention. It suggests a system that can work, and it testifies to the broadness of this nominee's interests and skills.

We liberals occasionally make the mistake of believing that conservatives are inevitably and necessarily callous in social matters. It ain't so, and this is an important opportunity to say so, and simultaneously a superb occasion to give witness to the praiseworthy concerns of this nominee as a public servant in an area of her life which has not been discussed heretofore much, if at all.

This concern of hers only adds another dimension to a person who already has quite a few strings to her bow. I know her to be intelligent and fair minded, to be judicious and patient. I suppose, the way the world works, the first woman Supreme Court Justice has to be superior to most male nominees. Well, she probably is. She does more things better than anyone else I know, male or female.

She knows when to talk and when to listen, and that following rules in the absence of any other direction is well advised, although the first rule is to suspend all the other rules when commonsense demands. In short, I think our citizens are, by a disposition toward fairness, ready for a woman for all seasons.

If you approve her, as I most heartily recommend you do, then you do a service to our Nation, to the legal system of this country, and you begin what would be—even in the absence of the high skills of this nominee—a wholesome, fuller view of our society.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. We are very pleased to have you with us, Mr. McNulty, and we thank you both for your appearance here today.

Are there any questions that any member has? Do any committee members have any questions?

[No response.]

The CHAIRMAN. It appears not.

Our next witness is Ms. Brooksley Landau, representing the American Bar Association, if you will come around, Ms. Landau.

Hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. LANDAU. I do.

The CHAIRMAN. Ms. Landau, I believe you are representing the American Bar Association.

Ms. LANDAU. That is correct, Mr. Chairman.

The CHAIRMAN. You may proceed.

TESTIMONY OF BROOKSLEY LANDAU, CHAIRPERSON, STANDING COMMITTEE ON FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION

Ms. LANDAU. Thank you.

My name is Brooksley Landau. I practice law in Washington, D.C., and I am the chairperson of the American Bar Association's Standing Committee on Federal Judiciary. I am here today to present the views of the American Bar Association on the professional qualifications of the Honorable Sandra Day O'Connor of Arizona, who has been nominated for Associate Justice of the Supreme Court of the United States.

Our committee has conducted an extensive investigation of Judge O'Connor. We have interviewed more than 300 persons across the country. We interviewed Federal and State court judges throughout the Nation. We interviewed a number of practicing attorneys and a number of deans and faculty members of law schools throughout the country.

We also asked a group of practicing lawyers and two groups of law school professors to review the written judicial opinions of Judge O'Connor and to give us their evaluations of those opinions. We talked to a number of Arizona State senators who had served in the senate with Judge O'Connor. Finally, three members of the committee interviewed Judge O'Connor at some length.

The purpose of our investigation was to analyze Judge O'Connor's professional credentials—her professional competence, judicial temperament, and integrity. Based on our investigation, the committee has unanimously adopted the following evaluation of Judge O'Connor:

The committee is of the opinion that Judge O'Connor meets the highest standards of judicial temperament and integrity. Her professional experience to date has not been as extensive or challenging as that of some other persons who might be available for appointment to the Supreme Court of the United States. Nevertheless, after considering her outstanding academic record, her demonstrated intelligence, and her service as a legislator, a lawyer, and a trial and appellate court judge, the committee is of the opinion that she is qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States.

I have filed with the committee a letter detailing our investigation and the basis for our evaluation, and I would like that letter, Mr. Chairman, to be submitted for the record, if that is possible.

The CHAIRMAN. Without objection, it will be placed in the record.

Ms. LANDAU. Thank you.

I would like very briefly to summarize our findings.

Our investigation revealed that Judge O'Connor is very intelligent, analytical, thorough, and hardworking. The diversity of her experience as a lawyer, legislator, and judge provides a valuable background for the Supreme Court. She is dedicated to the legal profession and has made significant contributions to her community.

Furthermore, the committee's investigation has demonstrated that Judge O'Connor has an appropriate judicial temperament. Her judgment is sound, and she is well respected by her colleagues. Her integrity is above reproach.

In conclusion, the committee has unanimously found that Judge O'Connor has the professional qualifications required of an Associate Justice of the Supreme Court of the United States.

Thank you very much.

The CHAIRMAN. Are there any questions by any member of the Judiciary Committee?

[No response.]

The CHAIRMAN. There appear to be no questions. We thank you very much, Ms. Landau, for your appearance.

Ms. LANDAU. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused.

[Material follows:]

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September 8, 1981

The Honorable Strom Thurmond
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is submitted in response to your invitation to the Standing Committee on Federal Judiciary of the American Bar Association ("the Committee") to submit its opinion regarding the nomination of the Honorable Sandra Day O'Connor of Arizona to be an Associate Justice of the Supreme Court of the United States.

The Committee has unanimously adopted the following evaluation of Judge O'Connor based upon the investigation described below.

The Committee is of the opinion that Judge O'Connor meets the highest standards of judicial temperament and integrity. Her professional experience to date has not been as extensive or challenging as that of some other persons who might be available for appointment to the Supreme Court of the United States. Nevertheless, after considering her outstanding academic record, her demonstrated intelligence and her service as a legislator, a lawyer and a trial and appellate judge, the Committee is of the opinion that she is qualified from the standpoint of professional competence for appointment to the Supreme Court of the United States.

The Committee's investigation of Judge O'Connor was limited to her professional qualifications -- her professional competence, judicial temperament and integrity. Consistent with the Committee's longstanding tradition, the Committee has not undertaken to make any determinations about Judge O'Connor's general political ideology or her views on any issues that she may face should she be confirmed to serve on the Supreme Court of the United States. These issues are not matters properly of concern to the Committee. */

The Committee's investigation of Judge O'Connor included the following inquiries:

(1) Members of the Committee interviewed a large number of federal and state judges throughout the United States.

(2) Members of the Committee interviewed a cross section of practicing lawyers, including government lawyers, legal services and public interest lawyers and private practitioners, both in and outside of Arizona.

(3) Members of the Committee interviewed a number of deans and faculty members of law schools throughout the country.

(4) Members of the Committee interviewed a number of members of the Arizona State Senate.

(5) A group of practicing attorneys and two groups of law professors reviewed Judge O'Connor's judicial opinions.

(6) Three members of the Committee interviewed Judge O'Connor.

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*/ The Committee's approach in this respect is based on well established standards of behavior governing the conduct of those seeking judicial positions. These standards, which are set forth in the American Bar Association's *Code of Judicial Conduct*, provide that a candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues . . . ." ABA *Code of Judicial Conduct*, Canon 7, ¶ B(1)(c). Because it would be improper for a nominee to address such political matters, it would be inappropriate for the Committee to evaluate a nominee on that basis.

Professional Background

The Committee's investigation revealed that Judge O'Connor's career has included service as a practicing lawyer, a legislator, and a judge. She received an A.B. degree with great distinction from Stanford University in 1950. She received an LL.B. from Stanford Law School in 1952. While in law school, Judge O'Connor was a member of the Board of Editors of the Stanford Law Review and was elected a member of the Order of the Coif, an honorary scholarship society. She was admitted to the Bar of the State of California in 1952 and to the Bar of the State of Arizona in 1957.

Judge O'Connor spent a year in 1953 working at the San Mateo District Attorney's Office in California, first as a law clerk and then as a Deputy District Attorney. Thereafter, from 1954 through 1957 she worked as a civilian attorney at the Quartermaster Market Center in Frankfurt, West Germany.

From 1959 to 1965, Judge O'Connor was engaged in the private practice of law in Maricopa County, Arizona. Her practice covered a broad spectrum of matters, including contracts, domestic relations, and criminal matters. She was also active in community volunteer work, including work in county bar activities and service as a juvenile court referee.

From 1965 to 1969 Judge O'Connor was an Assistant Attorney General in Arizona, representing the state finance department, the state auditor, the governor's office and the state welfare department. Then in 1969 she was elected to the Arizona State Senate where she served two terms until 1975. During this period Judge O'Connor was elected Majority Leader of the Arizona State Senate and served as Majority Leader during 1973 and 1974.

In 1975 Judge O'Connor was elected Superior Court Judge in Maricopa County, Arizona. She was elevated to the Arizona Court of Appeals, an intermediate state appellate court, by Governor Babbit in 1979 and has served as a judge of that court until the present.

Through interviews of those who worked with Judge O'Connor during various stages of her professional career, the Committee learned that she has performed her work very competently, has demonstrated a high degree of integrity and has displayed excellent judicial temperament.

1. Interviews With Judges

In its investigation the Committee interviewed more than three hundred persons of whom over a hundred and fifty are federal, state and local judges. A significant number of the judges interviewed are judges sitting in Arizona who are familiar with Judge O'Connor and her experience as a trial and appellate judge. Judge O'Connor received uniformly favorable reviews from these individuals. Her colleagues on the Arizona Court of Appeals referred to her as "a tremendous worker," "a careful and exacting lawyer" and "a person of superb quality and keen intelligence." In addition, judges from the U.S. Court of Appeals for the Ninth Circuit who are familiar with Judge O'Connor expressed their admiration for her performance on the bench, her integrity and her judicial temperament.

The Committee also interviewed federal and state judges outside Arizona. Although most of these judges have no firsthand knowledge of Judge O'Connor's performance, those who do described her in favorable terms. She was characterized as "intellectually well prepared," "very thoughtful" and "capable of mastering anything she puts her mind to master." Many judges who do not personally know Judge O'Connor have a favorable impression of her based on conversations they have had with their colleagues. On the whole, the Committee found that the judicial community -- both in and outside of Arizona -- supports Judge O'Connor's nomination.

2. Interviews With Lawyers

In our evaluation of Judge O'Connor, the Committee contacted about a hundred practicing lawyers throughout the United States. We talked with a broad cross section of the legal community, including lawyers who represent women's groups, minority groups, labor unions, large corporations, individuals in civil litigations and defendants in criminal cases. Without exception the Arizona lawyers who were interviewed reported favorable impressions of Judge O'Connor, her abilities as a lawyer and her performance as a trial and appellate judge. They described her as "bright" and "objective" and as a "quick study." Lawyers who have tried cases before Judge O'Connor reported that she is always prepared and runs a "tight ship" in the courtroom. These interviews convinced the Committee that, although her experience as a trial and appellate judge has been limited, Judge O'Connor has demonstrated the necessary qualities of professional competence, judicial temperament and integrity.

Very few lawyers interviewed who practice outside of Arizona are personally familiar with Judge O'Connor. However, the uniform reaction of those who have a basis for opinion is favorable. One lawyer aptly summed up the comments received by saying that he would give Judge O'Connor "high marks in every department."

3. Interviews With Deans and Professors of Law

The Committee spoke to more than forty deans and faculty members of a number of law schools throughout the country. Only a few of those to whom we spoke know Judge O'Connor personally or are familiar with her work on the bench. However, those individuals spoke favorably of Judge O'Connor.

4. Interviews With State Senators

The Committee interviewed approximately a dozen Arizona State Senators -- both Democrats and Republicans -- who had served with Judge O'Connor. They were uniform in their praise of Judge O'Connor, describing her as "an excellent Senator," "an enormously intelligent person," "a woman of integrity" and a "very fair and open-minded" person. The Committee was assured that "she has no prejudices with respect to race, creed or color."

5. Survey of Judge O'Connor's Opinions

Judge O'Connor's opinions and other legal writings were examined for the Committee by a group of practicing attorneys and by two groups of law school professors. Those consulted expressed differing views concerning the strength of her opinion writing. Judge O'Connor has written relatively few published opinions -- approximately thirty -- since she became a judge in 1975. She has also written two published articles. Not surprisingly, Judge O'Connor's opinions deal almost exclusively with issues of state law. For the most part, the subject matter of her opinions is such that they do not involve the elaborate legal analysis or complex social issues often found in Supreme Court decisions. Nonetheless, the Committee concluded that the opinions are competently written and her writing style is clear and logical.

6. Interview With Judge O'Connor

Judge O'Connor was interviewed by three members of the Committee. Their impression of Judge O'Connor is that she is an intelligent, articulate person who is committed to the law and to equal justice and who is concerned about people and their problems. She will approach her new position, if confirmed, with enthusiasm, determination and dedication.

* * *

Based on the investigation described above and notwithstanding the fact that Judge O'Connor's professional experience has not been as extensive or challenging as that of others who might be available, the Committee has unanimously found that Judge O'Connor has the professional qualifications required of an Associate Justice of the Supreme Court of the United States.

Those who have worked with Judge O'Connor describe her as very intelligent, analytical, thorough and hard-working. The diversity of her experience as a practicing lawyer, legislator and judge provides a valuable background for a Supreme Court Justice. She is dedicated to the legal profession and has made significant contributions to her community.

Furthermore, the Committee's investigation has demonstrated that Judge O'Connor has an appropriate judicial temperament. Her judgment is sound, and she is well respected by her colleagues. Her integrity is above reproach.

This report is being filed at the commencement of the Senate Judiciary Committee's hearing. We will, as a matter of routine, review our report at the conclusion of the hearings and notify you if any circumstances have developed that may require modification of our views.

Respectfully submitted,

Brooksley E. Landau
Brooksley E. Landau
Chairperson

BEL:djr

The CHAIRMAN. Now we have a lady here that has to catch a plane and is also scheduled to testify, we will take her next: Ms. Kathy Wilson, National Women's Political Caucus. Ms. Wilson, will you come around?

Raise your right hand and be sworn in.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WILSON. I do.

The CHAIRMAN. Have a seat, and we will be glad to hear from you.

TESTIMONY OF KATHY WILSON, NATIONAL WOMEN'S POLITICAL CAUCUS

Ms. WILSON. Thank you.

I am Kathy Wilson, chair of the National Women's Political Caucus. Accompanying me today is Susan Ness, director of the NWPC judicial appointments project. In addition to my organization, I speak today on behalf of 21 organizations, which include the American Association of University Women, Arizona Women Lawyers' Association, Federally Employed Women, Mexican-American Women's National Association, National Association of Negro Business and Professional Women's Clubs, National Council of Jewish Women, National Federation of Business and Professional Clubs, National Women's Party, Rural American Women, and the Women's Equity Action League.

Mr. Chairman and members of the Senate Judiciary Committee, thank you very much for providing the National Women's Political Caucus with the opportunity to testify before you in support of the confirmation of Judge Sandra Day O'Connor, nominee for Associate Justice of the U.S. Supreme Court.

The millions of women I speak for today are delighted by the appointment of Judge O'Connor, the first women selected to serve on the U.S. Supreme Court in its 190-year history.

As a jurist, Judge O'Connor has consistently demonstrated those qualities that are the foundation of the American judicial system: the highest standards of professionalism, competence, integrity, judicial temperament, and commitment to equal justice under law. She enjoys a reputation of being fair and impartial. The extremely high rating she was given by members of the Arizona Bar is testimony to the respect and esteem in which she is held by those practicing before her.

Earlier in her career, she also distinguished herself as a lawyer and outstanding public official. Her accomplishments are not limited to her professional life, however. In her private life as well she has given generously of her time, helping a wide variety of community institutions.

Thus, we testify today in support of an individual who on the basis of her past achievements shows great promise to become a truly distinguished Supreme Court Justice, but our presence here today is for someone who will be more than simply one of the nine Justices on the highest court in the land. She will become the first woman to hold that position in the 190-year history of the Court, and follows an unbroken string of 101 Justices—all men.

This confirmation hearing thus marks a historic occasion, the culmination of over 100 years work on the part of women and men to break down the barriers to equality for women and men in our system of justice. Only 108 years ago, the U.S. Supreme Court—on which Judge O'Connor soon will sit—in the infamous case of *Bradwell* v. *Illinois,* upheld a State court refusal to admit women to the practice of law on the grounds that women were unsuited for such a role. Not until the turn of the century were women allowed to practice law in most States, and only within the last 10 years have all American Bar Association approved law schools opened their doors to women.

The advancement of women as Federal judges was equally slow. Not until 1934, with the appointment of Judge Florence Allen to the U.S. Court of Appeals for the Sixth Circuit, was there a female Federal judge. For many years she remained the only woman. Despite strong support for her around the country, Judge Allen was not to become a member of the Supreme Court—solely on account of her sex.

Only within the past 4 years have women begun to be appointed in significant numbers to the Federal bench. During this period, the number of female Federal judges jumped from 5 to 44, or from 1 percent to 6.6 percent of the Federal judiciary. Given the fact that there are over 70,000 female lawyers in the United States today, such an increase is not surprising; rather, it is long overdue.

In applauding the selection of Judge O'Connor to the Supreme Court, we caution against allowing that milestone to mask the need for greater representation at every level of the judiciary. With three-fourths of the U.S. district courts and one-third of the circuit courts still male only, much remains to be done to bring about a better balanced judiciary. Nor should we be content to see Justice O'Connor remain the only woman on the Supreme Court. As vacancies on that Court arise, other women should be considered and selected as well.

As the first and, for now, only female Supreme Court Justice, Judge O'Connor undoubtedly will be in the public limelight. That is a tough assignment, but we feel confident that this particular Supreme Court nominee will carry out that role with dignity, wisdom, and sensitivity. We of the National Women's Political Caucus wish her well, and we urge the Senate to accord her a speedy confirmation.

Thank you.

The CHAIRMAN. Any questions by any member of the committee? [No response.]

The CHAIRMAN. If not, Ms. Wilson, we thank you for your appearance here today.

Our next witnesses are a panel of two: Dr. Jack Willke and Dr. Carolyn F. Gerster of the National Right to Life Committee. We will ask these two witnesses to come forward.

Will you hold up your hands and be sworn?

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. WILLKE. I do.

Dr. GERSTER. I do.

The CHAIRMAN. Have seats, and we will be pleased to hear from you.

TESTIMONY OF DR. CAROLYN F. GERSTER, VICE PRESIDENT IN CHARGE OF INTERNATIONAL AFFAIRS, NATIONAL RIGHT TO LIFE COMMITTEE, INC.

Dr. GERSTER. I would like to thank Senator Strom Thurmond and the members of the Senate Judiciary Committee for this opportunity to testify at the confirmation hearing.

I am an Arizona physician, cofounder, and first president of the Arizona Right to Life. I have served as director from Arizona to the national board since its formation in 1973. I was immediate past president and am currently vice president in charge of international affairs.

I would like to preface my written remarks by saying that, as a woman in a profession that is still dominated by men, I believe that the nomination of a woman Justice to the U.S. Supreme Court is about 200 years overdue, and I wish with all my heart that I could support the nomination of this fellow Arizonan.

I would like to comment on the Justice Department memorandum that has been mentioned by Senator Denton, a memorandum from Kenneth W. Starr dated July 7, 1981, summarizing his July 6 telephone investigation of Judge Sandra O'Connor's voting record in family-related issues during the period that she served in the Arizona State Senate. The memo reads in part:

> Judge O'Connor indicated, in response to my questions, that she had never been a leader or outspoken advocate on behalf of either pro-life or abortion rights organizations. She knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her.

I was not contacted by the Justice Department for a verification. This statement has been understandably misunderstood by members of the legislature and the media to imply that Judge O'Connor and I share similar beliefs on the abortion issue.

I have known Sandra Day O'Connor since 1972. Our children were members of the same Indian Guide group. We attend the same church; we have the same friends. She is a very gracious and a very gifted lady.

Quite apart from our social contact, however, we were in an absolute adversary position during 1973 and 1974 due to Senator O'Connor's position on abortion-related legislation when she served as senate majority leader. The Justice Department memorandum is misleading and incomplete regarding Senator O'Connor's voting record from 1970 through 1974.

All of the votes cast on abortion-related bills during this period have been consistently supportive of legalized abortion, with the possible exception of senate bill 1333, which actually is interpreted as a conscience clause allowing physicians and hospital personnel the right to object on moral or religious grounds. What the Starr memorandum fails to mention is that this passed 30 to 0, supported by those on both sides of the abortion question.

In 1970, house bill 20 proposed to remove all restrictions from abortions done by a licensed physician without regard to indication or duration of pregnancy. This bill, which predated the infamous 1973 U.S. Supreme Court decision by 3 years, if passed would have allowed abortion on demand to term. This was a radical concept when compared to existing State laws at that time.

The Justice Department memorandum states that "There is no record of how Senator O'Connor voted, and she indicated that she has no recollection of how she voted." Judge O'Connor has so stated in her testimony. As a reason she gives "the literally thousands of bills" that were presented during her 4 years.

This bill was controversial. It was news in Arizona. It was opposed by the Catholic bishop. It was the subject of editorials. She voted for it twice, in judiciary and again in the majority caucus.

Despite the testimony given earlier, as indicated by Senator Denton there was a choice. There was a bill sponsored by Senator McNulty which was a more moderate bill. Judge O'Connor has said that it was too complicated a mechanism. The bill would have required parental consent for minors, cut off the abortion at 4½ months gestation except for life of the mother, and allowed for informed consent of the girl.

The Justice Department memo states in reference to the 1973 Family Planning Act, "The bill made no express mention of abortion and was not viewed as an abortion measure."

Rather than go on with my testimony which details the errors and omissions page by page of the Starr memorandum, paragraph by paragraph, as my time is growing short I will submit the manuscript. I can say that I came here prepared to tear up my testimony and to enthusiastically support Judge O'Connor's nomination. I believed that, as she had promised, that she would speak on substantive issues, primarily abortion, before this committee. We have not had that assurance.

I am aware that despite the commitment given by the present administration and reiterated in the Republican Party platform that "We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life," that there are members sitting here that do not agree with that. However, I think that all members of this committee agree that misrepresentation, evasion, and distortion of fact have no place in the selection of a Justice to the U.S. Supreme Court.

Thank you.

The CHAIRMAN. Dr. Willke, we will be glad to hear from you.

TESTIMONY OF DR. JOHN C. WILLKE, PRESIDENT, NATIONAL RIGHT TO LIFE COMMITTEE, INC.

Dr. WILLKE. Thank you, Mr. Chairman.

I am John Willke, physician and current president of the National Right to Life Committee. I speak here for that committee, which is composed of the 50 State right-to-life organizations which contain almost 2,000 active chapters and an estimated millions of membership.

We are concerned. We exist as a movement because of the 1973 *Roe* v. *Wade* decision of the U.S. Supreme Court. Just as the *Dred Scott* decision of 1857 was a civil rights outrage in that century, so we see *Roe* v. *Wade* as a similar blot upon our Nation in this century. In *Dred Scott* the Supreme Court ruled that an entire class of living humans were chattel. This decision denied black Americans civil rights and equal protection by law.

Accordingly, let us flash back in time, if you please, to the post-Civil War era, and ask a question. Suppose a nominee to the U.S. Supreme Court at that time was being questioned and his qualifications examined. Suppose that that person as a legislator had previously voted for the continuation of slavery, not once but twice. Suppose also that he had voted on a memorial resolution asking the Congress to pass a constitutional amendment to abolish slavery, and that that nominee had voted against that resolution and for discrimination, not once but twice.

Would not then it be a proper question to that nominee to inquire whether that nominee still held those proslavery convictions? We believe so. We also believe that if such earlier actions were not totally repudiated by that nominee, that such person would be disqualified from sitting on the U.S. Supreme Court.

A century has passed. Another Supreme Court by a similar 7-to-2 decision—*Roe* v. *Wade*—has ruled that another entire class of living humans were to be reduced to the status of property of the owner—the mother; further, that the mother was given the newly created right to privacy, a right that allowed her to have her property—her unborn child—destroyed if she wished. Because of this ruling and because of the Court's interpretation of the word "health," we have a body count today of 1.5 million a year.

There are indeed some single issues which are so fundamental that they ought to be weighed very heavily in considering any lifetime appointment to the Federal bench, among these, racial justice. In 1948, G. Harold Carswell gave a speech in which he said, "I believe that segregation of the races is the proper and only practical and correct way of life in our States." During Senate consideration of his nomination 22 years later, he completely repudiated that position, and yet the matter weighed heavily upon the minds of many Senators, and quite properly so. Concern over that earlier commitment to racial injustice perhaps played an important role in the rejection of his nomination.

We believe that recognition of the right to life of the unborn child is also just such a fundamental issue. Those who do not recognize this right, we suggest, should be disqualified from sitting on the Federal court.

A nominee now sits before this distinguished body. You must decide whether she is qualified to sit on the Court, and there are serious questions. Her record as a State legislator is very disturbing.

In 1970, as a State Senator, at that time only one-third of the States had legalized abortion and most laws were highly restrictive. New York, in that same year, had passed abortion on demand until 24 weeks and was to be the second last State that legalized abortion through statute. Thirty-three States subsequently voted on the issue and voted down proposed abortion laws. The Nation had been shocked by this.

In this climate, Senator O'Connor voted for a bill that would have legalized abortion on demand in the entire 9 months of pregnancy. No statute remotely as radical had been considered elsewhere. This was not a casual vote on the floor; this was a vote on a committee, after having studied it.

Again, a year after the Supreme Court decision which did legalize abortion in the entire 9 months of pregnancy, she had an opportunity to vote against that sweeping decision. Again, on two occasions she voted to maintain what has been abortion permissive through the 9 months of pregnancy.

She has recently stated that she is personally opposed to abortion. In no way referring to the nominee, let me merely state that I have never met an abortion chamber operator or an abortionist who was not personally opposed to abortion. The simple fact is that such a personal statement does not in any way relate nor is an indicator of how such a person may view abortion for others, or in the case of a public servant, how they will vote or how they will rule.

Finally, the last point is that many legal scholars are quite convinced that the decision of the Supreme Court in *Roe* v. *Wade* was in fact raw judicial power and activism. The nominee here has been held up as a constructionist. It would seem to us that in fact, if she does not repudite *Roe* v. *Wade*, that that fact alone denies that title and should deny her the nomination.

Finally, in closing, I want to make one personal remark about the lady who sits next to me. She is probably no more or no less perfect than any of us. She probably has her faults. One fault, however, that she does not have, and none of us who know her could possibly imagine her having, that is, being vindictive.

Thank you, Mr. Chairman.

The CHAIRMAN. Are there any questions by any member of the committee?

If so, feel free to proceed. We will start with Senator Dole, I believe.

Senator Laxalt, did you have any questions?

Senator Dole.

Senator DOLE. Well, as I understand it, except for this one issue you have no quarrel with the nominee. Is that correct?

Dr. **Gerster**. We are a one-issue organization, and that issue is human life. That is, as an organization, our only objection. Yes.

Senator **Dole**. What about your personal opinion, then?

Dr. **Gerster**. As I said in my earlier letter to the Attorney General of the United States—to which I received no answer—criticizing the Starr memorandum, I said that I believe that Judge O'Connor, then Senator O'Connor, is highly intelligent, capable, very dedicated, and a likable person.

That, of course, is beside the point. We are not speaking of personalities. We are speaking of issues.

Senator **Dole**. I think somebody mentioned to me the other day, I guess the last time we had a hearing of this kind was in 1973 with Justice Stevens. Was the abortion question raised in that hearing?

Dr. **Gerster**. No, it was not, to my knowledge.

Dr. **Willke**. To our knowledge, no, not to our knowledge.

Dr. **Gerster**. It was not an issue, of course, in 1973 that it is today. Also, we did receive the commitment. I personally——

Senator **Dole**. Excuse me, 1975.

Dr. **Gerster**. In 1975 it certainly was an issue, yes. No, I think the reason that the—the prominence of the question——

Senator **Dole**. The point I make here, you are talking about a vote she made in 1970; but here in 1975 we had a nominee before the committee. As I understand there was not a single question directed to the nominee concerning abortion.

Dr. **Gerster**. That is true.

Senator **Dole**. It was an issue in 1975, at least it was in my 1974 campaign.

Dr. **Gerster**. That is true. You are very correct. In 1973 it was not the issue that it was in 1975 but it was an issue in 1975. I think the reason it has become what some individuals have referred to as a litmus test is because of the assurance that we were given by the present administration and by the platform. It was made a litmus test.

Dr. **Willke**. Senator Dole, I might also suggest that there has been a considerable enlightenment of the people of this Nation, a rather substantial, sweeping, slow change in public opinion, and this has come to the fore in the minds of vast numbers of people today, as our last election campaign indicated only so well. It was not such a major issue before the minds of many of the public.

We have abortion on demand until birth in this Nation today because of nine Supreme Court Justices. The most crucial nomination that this group is going to sit for in terms of approval is that person, those people who sit on that very Supreme Court. They hold within their hands the power to stop the killing of the unborn in this Nation, and for this reason it is a major and, we feel, the most fundamental issue that should be considered.

Senator **Dole**. Right. I guess in essence, then, for your group to support the nominee it would take a statement by her to in effect repudiate that decision.

Dr. **Willke**. Senator, we are quite aware that a person might feel personally opposed to abortion. We are quite willing to accept that that same person might feel that laws should be passed to permit abortion. It would also be possible for that same person, however, to view the *Roe* v. *Wade* decision as an extreme and destructive example of judicial lawmaking and be in favor of the reversal of that, as a frankly unconstitutional amendment.

We had hoped that Judge O'Connor would take that position. In listening, however, for 2½ days, we have heard nothing that would give us an indication that that would be so, and we did believe that she would be willing to speak to that issue. At least to our ears, she has not.

Senator DOLE. Again the question is, it would take that, a repudiation of that decision—not a statement about judicial restraint or strict constructionism or not being a judicial activist—it would take an outright statement by her that she would in effect repudiate that decision before your organization would support her. Is that correct?

Dr. WILLKE. We would want something of that type of assurance, and we have received none.

Dr. GERSTER. I think even the assurance that she now would have voted differently on any of the other votes other than the 1970 vote—that was an extreme, radical measure, and that is the only one to which she has addressed actually a regret of the vote. I think that she has been very clear on other issues as far as busing, capital punishment, and has stated that the vote in 1970 to 1974 expresses her view today. She said that on a number of other issues but we have not heard this with abortion.

Senator DOLE. Now is that the same requirement you make of candidates you endorse, that they repudiate *Roe* v. *Wade?*

Dr. WILLKE. In fairly direct language, we ask—our political action committee does, as we sit here do not represent—we represent the National Right to Life Committee, Inc.—we ask that candidate to give us a clear statement if possible that they are in favor of law change or constitutional change that would provide for equal protection by law for all living Americans, whether they live inside the womb or not.

If said candidate feels that they do not wish to disturb the status quo and will allow the killing to continue, then it is our opinion that that position disqualifies that person from holding public office. Just as I drew the analogy with slavery and feel that rightly so, a proslavery position—regardless of whatever other position a candidate or a judge candidate would hold—that position was so ugly and so fundamentally evil that it disqualified that person from being a public servant, so we feel that a position that allows the continued killing of innocent unborn is just such a disqualifying issue.

Senator DOLE. Well, I think my record, my prolife record is good but I——

Dr. WILLKE. Senator Dole, we are not worried about you.

Senator DOLE [continuing]. But I am not the nominee. That is the problem. It is not a problem, probably a benefit.

However, I can recall situations, though—I might say just as a matter of an aside—where I was not even permitted to be heard by the prolife group in Iowa, for example, so I am not suggesting that any of us are perfect.

It just seems to me that those of us who sit on this committee and also will be voting in the Senate certainly are concerned about the very statements both of you have made. I think many of us on this committee have consistently supported those ideas.

We consider that to be a very vital matter in our decisionmaking process but I am not certain we can suggest that, if, for any reason there is not total repudiation of *Roe* v. *Wade*, that we must vote against the nominee. I cannot subscribe to that. I am not certain what that does to me but I believe, based on what I have heard, that she deserves strong support from this committee.

Dr. **Willke**. Mr. Dole, all we can do is suggest that we feel it is just that basic an issue. We can only suggest it to the distinguished members of this body for your consideration, and we can only hope that you will weigh it heavily enough to give it its just due.

Senator **Dole**. Thank you. I appreciate your testimony but it seems to me that I would have hoped that you might have, after 2½ days, found it possible to support the nomination.

Dr. **Gerster**. Senator, I wanted that with all my heart, I really did. You have no idea of the burden that this has placed on me as an Arizonan and as an acquaintance of Judge O'Connor. I listened to every minute of testimony on public television and took extensive notes, looking for some word.

Highly disturbing to me, particularly was the answer to Senator Kennedy's question, that intimated that more knowledge had been gained but not a change of view. I thought that was a very unfortunate answer.

I felt, in answer to Senator DeConcini, her very strong personal view was voiced very sincerely that this was personally abhorrent to her, and then when Senator DeConcini asked if this had been a recent change of heart and she said no, that this had been a view she had held for "many, many years" based on her own family and experience. I am sure that in conversations with her earlier, during 1973 and 1974, this was a view that she held then, that abortion was personally abhorrent to her, but at the same time, of course, her legislative record is consistently proabortion. That is what disturbs me.

Senator **Dole**. However, I think finally that less than 6 years ago the question was never raised, and today you are suggesting that not only should it be raised but we should not vote for a nominee who does not have the right position on abortion. That is a big change in a 6-year period.

I assume that nominee Stevens was carefully examined. I was not on the committee at that time. I do remember the Carswell nomination. You correctly indicated one of his problems but there were others, and I supported that nomination. The vote on the Senate floor, I think, was 55 to 45.

I guess that is an indication that either somebody was not alert in 1975 or that we have moved a long way in 6 years to say that if you are not exactly correct on this one issue you should not sit on the Supreme Court. Six years ago have the question not raised at all.

Dr. **Willke**. Senator Dole, might I suggest that it was being raised. It simply was not being raised very loudly by very many people, and it was not being heard. Also, Justice Stevens as I recall did not have a legislative record and had not ruled on any significant prolife or proabortion cases.

I recall being a leader of the movement, as was Dr. Gerster at that time, and we simply did not have the strength, the organization to approach it at that point.

Dr. **GERSTER**. I am sorry. If I could just add one comment, I think were this a Cabinet appointment, were it an appointment to any other position we would not show the concern that we have. However, as has been pointed out, the U.S. Supreme Court has taken unto itself awesome power.

The power that enabled seven men to strike down the law of all 50 States, including Arizona, that is power, and there is no legislative recall, not the ordinary form of legislative recall. We may anticipate 20 to 30 years in this particular position of power. That is why the Court appointment is so important to us, Senator.

The **CHAIRMAN**. Senator Metzenbaum.

Senator **METZENBAUM**. Dr. Willke, it is nice to see you again and welcome you back to Washington.

Dr. **WILLKE**. Thank you, Senator.

Senator **METZENBAUM**. Dr. Gerster, it is nice to have you before us.

I have concerns, whether it has to do with right to life or any other single issue, as to what happens to the fabric of our democracy if we are to elect or defeat people, or nominees to the Supreme Court, based upon any one single issue. When Judge Mikva was before this committee the issue was gun control. Now Judge O'Connor is before this committee; the issue is right-to-life.

Both of you are very intelligent people. Both of you, I am sure, are good Americans, but I truly question whether you or anyone else should judge any particular individual for elective office or appointive office based upon one issue. The woman who is up for appointment does not meet my criteria as to what I think a Supreme Court Justice should be. I would not necessarily have appointed her, but that, in my opinion, is not the issue.

She has indicated by her comments that she and I differ strongly on the scope of the first amendment, which I hold very high. Should I, on that basis, vote against her? She has indicated her views with respect to capital punishment, busing, a number of other issues. She was not asked about gun control but, regardless of what the particular issue is, should any member of this committee vote for or against this woman and her confirmation based upon one single issue?

I asked her in the last couple of days about the question of access to the courts, I am concerned about whether or not the poor can get into the courtroom, whether or not they should be denied the right to be in the courtroom because a case is below $10,000 in value. She and I are diametrically opposed on that issue. She wrote an article in which she made that very clear. Should that be a basis for me to vote against her confirmation?

She belongs to some clubs that, in my opinion, are discriminatory. Should that be the basis on which I vote against her confirmation? She has different views than I do as to the role of the Government as it pertains to proper Government surveillance. Should that be the basis on which I vote against her confirmation?

More broadly, the polls indicate that there are a substantial block of Americans—I do not know whether it is a majority, I am told that it is a majority—who approve of abortion under certain circumstances. Should all of those people be denied appointment to the Supreme Court of the United States, or be denied the opportunity to be elected, because of the position that your organization has taken?

Frankly, it disturbs me, not because I do not respect full well your right to take any position that you want—to me, that is fundamental in this country—but what concerns me is that any group holds itself out and says that on the basis of this issue, this is more important than any other issue. That, I believe, is enough to disturb all of us because I think it strikes at the very heart of the system of government under which we live.

Since I do respect both of you as good Americans, I find something un-American about any particular candidate or any particular appointee being judged on the basis of one issue and one issue alone.

Dr. **Willke**. Senator——

Dr. **Gerster**. I would like to address myself to that also.

Dr. **Willke** [continuing]. I think we have to make a distinction between single issue and disqualifying issue. It is our opinion that only once or twice in a century does an issue raise itself in our society that is of such overweening and overwhelming importance, that strikes so clearly to the very heart of the basis of our society and the basis of the freedoms that this Nation has been built upon, the most basic right of all, that unalienable one, to live.

In the last century I mentioned one that arose, and I am sure we have no disagreement here. For someone to have been proslavery after the Civil War was certainly a single issue but I do believe it would have been a disqualifying issue.

For someone today, to pick another example, to be in favor of killing of 2-year-old girls, would disqualify them from holding public office. We would hold that so evil and abhorrent that we would say that simply disqualifies a person.

We have seen members of legislative bodies disqualified for lesser issues—theft, charges of various irregularities—and our Nation has turned them out of office on the basis that this issue was disqualifying. Even certain personal actions, after hours, if you please, have taken members of various legislative bodies out of office, have been viewed by the voters as disqualifying issues.

I would suggest that the killing of 1.5 million innocent unborn babies a year is such an intolerable evil that it is that once-in-a-century issue. You must respect—and you have said you do and we appreciate the respect—that vast numbers of people in this Nation view that as such an abominable evil, so utterly intolerable, that in fact while being single issue it is that once-in-a-century issue. It does in our minds disqualify a person from holding public office.

Senator **Metzenbaum**. It does not bother you that the gun control people think that is the most important issue? It does not bother you that the single issue prayer-in-the-school people think that is the most important issue? It does not bother you that there are so many groups who think that their issue is the only issue? Now you say that this has become the overriding, the paramount issue, but the fact is that a majority of people in this country have not indicated in the polls they agree with you, and seven Supreme

Court Justices have not indicated that they agree with you. Yet you feel that by reason of your position that that is the paramount issue, and that should disqualify this woman from being confirmed to the Supreme Court.

Dr. **Gerster**. Could I address myself to that, Senator.

Senator **Metzenbaum**. Please do.

Dr. **Gerster**. I think that this can only be supported in the context of civil rights, in other words, by law, to deny the right to life, liberty, or the pursuit of happiness to a group of individuals. Like you, I have many other interests. I am much more interested in ecology than the present administration would indicate. Like you, I am opposed to capital punishment, though I see it as a separate issue.

There are certainly other issues, very important issues. I would not call them disqualifying issues. Only a civil rights issue, I think, is disqualifying.

I think that you would agree that individuals should be disqualified if they wish to legislate the return to racial segregation. I think you would agree that an individual who carried the anti-Semetic feelings so far as to believe in the superiority of one race over another, with the legal implications that this suggests, those I think are disqualifying issues.

There is only one reliable poll, and that is the ballot box. When you use the exception "for life of the mother" which National Right to Life and most of the amendments before both Houses contain, most polls agree that 60 percent of Americans would favor an amendment that contained a "life of the mother" exception.

However, what we want is not to impose our morality on the rest of the Nation. We want the American people to have a right to choose. We want this out of the committee so our elected legislature, the House and the Senate, have the right to choose. If two-thirds so choose, then we want the people of America, three-fourths of the State legislatures, to have that right to choose.

We are not trying to impose a law on the Nation, but what we did was have the imposition of a morality by seven men who imposed their morality on some 210 to 214 million people at that time. I think that this is the tragedy, that one individual or seven individuals or nine individuals have that power. This is an extremely important position, and we cannot minimize that importance.

Senator **Metzenbaum**. I understand it is an extremely important position but my question really pertained to the fact that, you see, I may feel a little stronger than you do about the right to life. I am talking about those who are living. I am concerned about those who cannot feed their families and who cannot clothe their families and house them.

I am concerned about that aspect of the right to life for those who are the living, and yet I do not believe that because this woman is far more conservative than I and probably would not be willing to vote for many measures that I would be willing to vote for, that that justifies on the basis of the right to life—whether it is your concept of right to life or my concept of right to life—I do not believe that that justifies my voting against her.

Were we to do that, I am not certain what kind of Supreme Court we would have. I am not certain who would choose that perfect person who would be as acceptable to Mr. East and Mr. Grassley, and Senator DeConcini and Senator Metzenbaum and Senator Thurmond. I am not sure how you could do that.

However, what bothers me is that your group feels that this issue, this issue is so paramount that you have a right—and you do have a right to testify against her, and I respect that right—but I do question the Americanism of any group in this country which says that one issue is enough of a basis to be for or against an appointee to the Supreme Court or an elected public official.

Dr. **Gerster**. You say that you support the rights of living Americans. Senator, the baby within the womb is living. If the baby within the womb was not living, it would not be necessary to kill that baby.

Now the Court decision has led to a bloodbath of 1.5 million. Of that, in the last year tabulated, 130,000 were second and third trimester. Now those are big babies; those are babies you can hold in your arms. We had 13,000 of those that are babies 21 weeks and over. These are babies that could survive in a prenatal unit of a hospital.

We have had experiments which have been described in medical journals, 6 months after the Court decision, one of which involved cutting the heads off 12 babies born alive by hysterotomy abortion up to 20 weeks. The heads were then connected to a heart-lung machine; the internal carotid artery was cannulated. The 12 little heads were kept alive. I do not know how many days. When seven men on a high court declare a child a nonperson, that places that child in a separate category, and these individuals then can be substituted for the rhesus monkey.

Senator **Metzenbaum**. Dr. Gerster, I can only tell you that this Senator does not approve of killing, whether it is of people in El Salvador, whether it is of children in Colombia, whether it is of starving children throughout the world, whether it is by somebody's gunshot or some terrorist's effort. I believe that these, too, are important issues, but the law does not always go the way I think it ought to go.

The country's actions do not always go the way I think they ought to go, and yet I do not believe that we have the right to say that any one single issue—whether it has to do with something in this country or some far-off country—should be the basis on which you or Dr. Willke or those you represent or I should vote for or against the confirmation of a nominee. It will not be the determinant for this Senator.

Dr. **Willke**. Senator, I think it is important to note that the leaders of this movement are, far and away beyond the norm of this culture, caring people in the sense that they are concerned and are activists in many of the concerns about people, welfare, children who need homes, and so forth. We share much of that with you.

Our problem is that we simply—and let me put it very bluntly—do not think we can solve poverty by killing the unborn children of the poor. We do not think that the violence that you speak of, which we are concerned about, can be cured by the violence of the destruction of the unborn. We must find other ways.

Senator METZENBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina, Mr. East.

Senator EAST. Mr. Chairman, I appreciate the opportunity to speak very briefly.

I would like to welcome Drs. Gerster and Willke. We had the pleasure of having them testify before our subcommittee dealing with the human life bill, and we are delighted to see you back this morning.

Just as one single Senator who is a part of this confirmation process, I would like to underscore something that they have said, and try to put it in the context that the distinguished Senator from Ohio has put it in. I would agree with Senator Metzenbaum that ultimately Senators on this committee do have to weigh the whole, as they do in the Senate as a whole body.

However, having said that and acknowledged it, I would like to underscore what Drs. Willke and Gerster have said, that on occasion—whether it is this issue or any other—there can be matters that become of such overriding importance that they could well up as, if not the litmus test, at least as a critical and decisive test in making that determination. I am not suggesting for my colleagues that this is so in this case but I am saying it is not an unreasonable position to take, and that is the position you have taken.

For example, if we had a nominee—which we have not had—but if we had a nominee who had a tainted record, let us say, on their attitude toward race, or if they had a tainted record in their attitude on blacks or Jews or any other prominent group in the great American melting pot, that would be looked upon as deeply and profoundly suspect and perhaps infecting the whole, and it would not suffice to come in and say, "Yes, but they are rather strong on other things," or "They seem to make good sense on other things." If we had, for example, a nominee here who had very primitive attitudes in terms of the role of women in American society, I am sure we would have distinguished colleagues up here today saying, "That alone is enough to disqualify."

Now the single issue problem some say today plagues and haunts American politics, but yet I think Dr. Willke is correct. It is not an uncommon phenomenon. We know in the sixties the antiwar movement—frequently in a great, pluralistic democracy certain things well up and people wish to express themselves on it. They feel if it is not the litmus test, it is a dominant and overriding concern.

I would like to say that I feel these two very distinguished people come in that spirit, and with that kind of message. Whether it solves the problem for any given member of this committee, let alone for the whole committee, I do not know and I do not profess to speak to that. However, I would like, as one member of the committee, to underscore that their putting it in that perspective is reasonable. It is not wholly inconsistent with American history, previously, today, or in the future.

I did want to just make that statement for the record. I know time presses upon us, Mr. Chairman. I shall cease and desist, and allow my other distinguished colleagues to pursue what line of reasoning they think is pertinent.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Arizona.

Senator DECONCINI. Mr. Chairman, thank you very much.

Welcome, Dr. Willke and Dr. Gerster. We indeed are pleased to have you here, to have your expert advice. The research that you have done and the commitment of your position here I think is unquestionable.

I have the greatest respect, Mr. Chairman, for these two individuals, having worked with them in this cause and which many of us profess and have a deep commitment to. I thank you for your excellent articulation, Dr. Gerster, of the feelings and of the significance behind the right-to-life movement.

I wonder if, in the process of the testimony that we have had before us today, realizing your dissatisfaction with the answers from the nominee, you did give thought to the Arizona Legislature's very firm position of supporting memorial 2001 with only three dissenting votes—many of those who cast votes are identifiable in their prolife position, and committed people to it. Also, if you have had an opportunity to assess the significance of that particular memorial or of the witnesses that have appeared here, primarily from Arizona, who are identified as prolife?

I find it a difficult situation, quite frankly, that your organization has taken the position it has. I respect that, and yet many other people for whom I have the deepest respect on that same issue are coming to the conclusion that Judge O'Connor has made as firm a commitment, either to them personally and quietly or before this committee on how she feels about abortion. I wonder if you understand the reservation that she or any other nominee would have on saying how they would vote on a certain issue.

I wonder if you would like to comment on that?

Dr. GERSTER. Yes. I certainly respect the six members of the Arizona Legislature that testified. Four of the six are outstanding prolife leaders in the State, and certainly friends, one of them a patient. I was listening very closely to their testimony.

I had previously called Tony West and asked if the abortion question had been personally communicated to him, that there had been a change. I think his answer was what you saw reflected, particularly in answer to Senator Grassley's question, "How do you believe, based on what you know now, how do you believe that Judge O'Connor would vote on an abortion-related case coming before the U.S. Supreme Court?" All three of the representatives to whom that question was addressed said that they had no idea how she would vote, so they have literally taken this on faith.

Senator DECONCINI. Excuse me. I think Tony West made it very clear that he felt that she would vote a prolife position or he would not be there, if that——

Dr. GERSTER. Well, no, not in his answer to Senator Grassley's question. I wrote it down as each one answered. He said that he hoped that if she had not, thus far, changed her mind, that she would in the near future change her mind. I know, particularly with that one representative, this is the paramount issue——

Senator DECONCINI. Yes; indeed it is.

Dr. GERSTER [continuing]. And I respect him greatly. I think that they have gone on faith and trust and I hope that they are right. I hope it deep in my heart. However, I really had to have some assurance other than good will, which is all that they had.

Senator DECONCINI. Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. Thank you.

Senator Grassley.

Senator GRASSLEY. Dr. Willke, you stated in your prepared testimony that in *Roe* v. *Wade*, the Supreme Court—and I quote from your statement—"actually legalized abortion through the entire 9 months of pregnancy." As far as I know, the popularly held belief is that the case did not go that far, so I would like to have you elaborate on your statement.

Dr. WILLKE. Thank you. There is a general misunderstanding, Senator Grassley, out there, and it is incredulous to us that the true facts of the matter have not emerged. Everyone agrees that the Court ruled that there would be abortion on demand in the first 3 months. This was to be at the request of the mother, who had to have a licensed physician to do the job; no reason need be given.

Senator GRASSLEY. Yes.

Dr. WILLKE. Their second phase spoke of the time from the end of the first trimester until viability. The Court at that time estimated viability at being 24 to 28 weeks. In fact, it is down close to 20 weeks now, so that phase of time is roughly from the end of the first 3 months to about 4.5 or 5 months.

During that time, the Court allowed the same freedom to request and to perform the abortion to those two individuals but stated that the State could insert certain regulations. The thrust of those regulations had nothing at all to do with any protection for the unborn child. Again, no reason need be given. The thrust of those regulations in that phase was to make the procedure safer for the mother.

The third phase spoken to in the Court was from viability until birth, and if my memory serves—and I will quote from memory—during that time the Court said that the State may if it wishes proscribe—forbid—abortion but went on then to say that it was not allowed to forbid abortion if one licensed physician stated that this abortion was necessary to preserve her life—few would argue—or her health, and that was very clearly stated. If one physician saw it necessary to preserve her health, abortion was legal until birth.

Now the Court went to great pains to define the term "health." The Court speaks of that particular definition in three different places. It includes under that the woman's age; it includes under that—let me see if I even have this particular quote with me. I think I do. I will quote *Doe* v. *Bolton*.

> The medical judgment may be exercised in the light of all factors: physical, emotional, psychological, familial, and the woman's age, relevant to the well-being of the patient. All these factors may relate to health.

In the other decision, the definition of "health" was broadened to include if she were unmarried, if child care was to be a problem, if she faced a distressful life and future, and a number of others. In a concurring decision by Mr. Justice Douglas, which does not have the force of the decision but is certainly read, he included if it caused her to abandon educational plans, sustain loss of income, endure the discomfort of pregnancy.

Now I would submit to you that that definition of health sweeps so broadly that it can rather be defined as social distress of the woman as regarded by herself, assuming she can get a physician to agree with her.

As evidence of the fact that these late abortions occur, the State of Colorado, reporting on a 24-month period recently, detailed a total of 22 abortions in the city of Boulder, Colo., alone that occurred in the eighth and ninth months of pregnancy, 2 of them at 38 weeks—that is, 2 weeks before her due date. Those are officially reported in the health statistics of the State of Colorado.

Now we do have abortion in all 50 States in the entire 9 months of pregnancy. All you need is a licensed physician who will do the job and a woman who wants it done.

Senator **Grassley**. Dr. Gerster, in regard to the Arizona State Judiciary Committee's consideration of what is known as H.B. 20, could you expand on your knowledge of the committee's deliberations? For example, were there any amendments presented on the bill or was there a substitute bill considered?

Dr. **Gerster**. That is the 1970 bill, right? Yes. That would have removed—would have stricken all legal restraints from the Arizona law which allowed for life of the mother, and left only the words "done by a licensed physician." Therefore, this would have had no reference to duration of pregnancy, to indications, and were it passed would have been the most radical of all State legislation 3 years prior to the Court decision.

This passed the house and then passed the judiciary, Senator O'Connor having voted for it. It then went to the rules committee, where it failed to pass, but she voted for it again in Rules. In explaining this on the first day of testimony, Judge O'Connor said that this was the one vote that she did say she regretted, or she would not have voted today for that particular bill but she did so then because there was no other bill available.

We have been given a copy of senate bill 216, introduced February 6, 1970, by then-Senator McNulty, which was a more moderate bill. It would have limited gestation of pregnancy to 4.5 months. It would have allowed for informed consent: The details of embryology were to be given to the woman. It would have allowed for a conscience clause, that the operation be done in a hospital, and that in the case of a girl 15 years or younger, that parental consent would have been required.

This was the bill that this morning Judge O'Connor referred to—acknowledging that she knew of its existence—that mechanically it was too cumbersome. Now this bill predated the other bill. It went to the judiciary committee, on which then-Senator O'Connor sat. It was introduced on February 6, 1970. It was held in judiciary and then, when the more radical bill came along, it was voted out of judiciary in April. Having the choice of the two bills, she voted out house bill 20 which would have removed all restraint through 9 months of pregnancy.

Senator GRASSLEY. One last question, and you have already referred to it in your comments to my colleague from Arizona, but I wanted your individual reaction to what the three members of the house of representatives said yesterday about their feelings of Judge O'Connor's opinion on abortion.

Dr. GERSTER. I think that they truly believe—I know those three individuals very well, and I think they would not have appeared, as Senator DeConcini said, had they not believed that she had changed her mind. I also know very well that they had been given no indication, regarding the abortion question, that she has. They were very clear.

In answer to your question—it was a very good question, by the way—particularly I thought that the statement of Tony West was very poignant when he said that if she had not now, that he knew that she would change her mind. I can only say that I know that they are being sincere. I know that they spoke absolute truth.

Senator GRASSLEY. Let me ask you: Obviously, Representative West has a very good feel concerning the basic instincts of Judge O'Connor, and he feels that he has some understanding of those instincts. Do you share any of those insights?

Dr. GERSTER. No. When I talked to him at length, about an hour and a half, I said, "Tony, please share with me what you have because I want so badly to support this nomination." I said, "Did she address herself to abortion when she spoke to you?" He said, "Well, she couldn't."

However, she told him words to the effect that she "would not embarrass him." I think those were the words used. I suppose if——

Senator GRASSLEY. Isn't there a camaraderie there among friends and among former colleagues that maybe says more than words can say? A statement like that, doesn't that impress you at all?

Dr. GERSTER. No, not in the light of the testimony here in the first 2 days. I was very hopeful coming here, and I thought I would hear in that testimony, and I was extremely disappointed. I felt that more could have been said. If *Roe* v. *Wade* is discounted, and I know there is much controversy whether she could have addressed herself to an amendment which is a part of history but which may come up again—however, I do believe that we could have had clearer answers to her feeling, for instance, on the memorial of 1974 against the human life amendment even when rape and incest had been added to "life of the mother." I think we could have gotten a clear indication of how she would vote today on that bill. That is what I was hoping for.

Senator GRASSLEY. Mr. Chairman, I am finished.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Dr. Willke and Dr. Gerster, I want to welcome you back to the committee. When we last spoke, none of us thought that we would be back under these circumstances quite so quickly.

I have two lines of questions, both fairly brief. When Senator Dole asked questions concerning Justice Stevens, one of the questions was whether or not he was asked questions concerning *Roe* v. *Wade*. Apparently he was not asked any questions concerning that decision or concerning his position on abortion.

I am wondering whether in your view he should have been asked those questions by this committee during his confirmation hearing?

Dr. GERSTER. Yes, I believe so.

Senator BAUCUS. If, in answer to those questions, he at that time did not repudiate *Roe* v. *Wade* or did not take a strong position in opposition to abortion, would it have been your recommendation at the time that this committee should not have confirmed him?

Dr. WILLKE. I am sure that that would have been our recommendation, Senator Baucus. I could only repeat what I said a minute or two ago, and that was that the issue was certainly a much less discussed issue. The feelings of the Nation had not been nearly as aroused. We had not gone through the last two election campaigns in which this issue was decisive in replacing some members whose previous position had been proabortion.

I would suggest that there is a time in history when certain issues—when we can say that their time has come or is coming. There is certainly no question that the time for being concerned about the destruction of the civil rights of an entire class, the unborn, is here. I might suggest that the question will most certainly be relevant in the future.

Senator BAUCUS. Dr. Gerster, my second line of questions concerns your opposition to Judge O'Connor. I understand that one part of your opposition stems from her position on abortion.

I understand that the second part of your opposition stems from her lack of candor. Is that correct?

Dr. GERSTER. Yes. I think it is because she was attempting to be so honest to the committee, that she answered in the way she did. I believe that if you listen very carefully to her answers, we have only one statement of opposition. That would be to a sweeping law that would remove all restraints whatsoever during 9 months of pregnancy, the 1970 law she felt was a mistake.

I really, Senator Baucus, have to discount personal opposition. We have many Senators that we worked very hard against in our political action committees during the last election that were sincerely, personally opposed to it. The former President of the United States was personally opposed, and I really believe he was, personally opposed to abortion.

However, the distinction has to be made between being personally opposed and being willing to see restorations of the rights of the newborn. We are not insisting that an appointee to the U.S. Supreme Court be a prolife champion on a white charger. We only ask that they see the mistake of *Roe* v. *Wade*, even as constitutional law, and that we return this choice to the people of the United States, which I think is where the choice should have rested to begin with.

Senator BAUCUS. You apparently know the nominee fairly well, at least you are fairly well acquainted with her. In your opinion, what is her general reputation with respect to candor and honesty?

Dr. GERSTER. I think it is good. I have never had any reason to doubt it at all until the Starr memorandum, and I hope that that was due to the enthusiasm of Mr. Starr to present a good case for the candidate rather than——

Senator BAUCUS. Yes, that was the comment I was going to make. It is possible that the error was made by the author of the memorandum.

Dr. GERSTER. I would hope that is true. I was a little disturbed by the first few questions regarding the lack of memory of the vote, those two votes, in so radical a bill. We have no choice but to accept that but it is astounding that that could be forgotten.

Senator BAUCUS. Well, I must say in the short time I have been in the Senate, I would be hard pressed to remember some of the votes that I have cast in the past year or two. Thank you very much for your testimony.

Dr. GERSTER. Thank you.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. We have a witness who has to catch a plane right away. Dr. Willke and Dr. Gerster, would you mind keeping your seats, and we shall bring the other witness up for a minute or two?

The Honorable Joan Dempsey Klein, would you come forward. We understand you are with the National Association of Women Judges, and I understand you have to catch a plane right away.

Would you hold up your hand and be sworn?

Do you swear that the evidence you give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KLEIN. I do.

The CHAIRMAN. Have a seat, and you may proceed for 5 minutes.

TESTIMONY OF HON. JOAN DEMPSEY KLEIN, PRESIDING JUSTICE, CALIFORNIA COURT OF APPEALS, AND PRESIDENT, NATIONAL ASSOCIATION OF WOMEN JUDGES

Judge KLEIN. Thank you.

I understand my comments in their entirety will be made a part of the record, and so I shall summarize my remarks before this honorable committee.

The CHAIRMAN. Without objection, that will be done.

Judge KLEIN. Thank you.

It is with extreme pleasure that I appear before this committee to speak on behalf of the confirmation of the first woman nominee to the Supreme Court. I am before you in my capacity as president of the National Association of Women Judges, which is an association with which over half of the Nation's Federal and State female judges have affiliated, along with a number of male judges.

The purposes of the association include the discussion of legal, educational, social, and ethical problems mutually encountered by Women Judges and the formulation of solutions, and of course, efforts to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society.

As you might well imagine, the appointment of a woman to assume a place on the highest court has had top priority on our agenda. It seems to have been such a long time coming but, when considered in a historical perspective, perhaps the 191 years is an understandable period of time.

The legal roots of this Nation are in the English common law, which law classified women in the same category as chattels, children, and incompetents. As a consequence, women's activities outside the home were extremely restricted, including the opportunity to gain an education.

Even so, the now-famous lady, Myra Bradwell, qualified herself to practice law but denying her the right to do so, the Supreme Court in 1873 said, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."

From the beginning, women have had to wage a constant struggle to participate in that civil life. A constitutional amendment was required just 61 years ago to allow women to engage in the most basic and sacred right in a democracy, the right to vote, and although adopted in 1868, the much-heralded clause in the 14th amendment guaranteeing all persons the equal protection of the law did not protect women from laws that discriminate on the basis of sex. As you have been advised and know, of course, it was not until 1971 that the Supreme Court for the first time declared unconstitutional a blatantly sexually discriminatory State law because it violated the 14th amendment.

Societal changes in the lives of American women have come about slowly but surely. Compared to our mean beginnings, the changes are of staggering proportion. Women now constitute over 42 percent of the Nation's work force and over 50 percent of all women are gainfully employed outside the home. Women are seeking professional training in law and are participating in political decisionmaking in ever-increasing numbers. Today's factual knowledge of women indicates that indeed they are engaged in all aspects of civil life.

However, as timely as we consider this appointment to be and as eager as we are to have such an appointment become a reality, we are emphatic that the woman selected be of the highest caliber. By virtue of the fact that so many of us have been the "first woman judge" or the "only woman judge" in any number of situations, we are keenly aware of the spotlight focused on our every act and the scrutiny to which we are continually subjected. Such attention will be greatly magnified in the case of the first woman Justice on the Supreme Court. Her performance will reflect on all of us lesser judicial luminaries, and we want to be assured that she has the capacity to succeed.

For these reasons and more, I am pleased to report that the national association finds the nominee to be exceptionally well qualified. Certain of our members participated in an evaluation of her and made the customary inquiries relating to professional competency, judicial temperament, and integrity. In addition, all of our 14 district directors were contacted and enthusiastically supported my appearance before this committee in her behalf.

Her integrity and morality we believe are above reproach. She is a stable, moderate, gracious, well-adjusted woman.

In conclusion, please allow me to reiterate my pleasure at participating in this historical event on behalf of the National Association of Women Judges. We urge the immediate confirmation of Judge O'Connor so that she can be in place and ready to proceed on the first Monday in October.

The CHAIRMAN. Judge, would you tell us the position you hold?

Judge **Klein**. I am a presiding justice of the California Court of Appeals, sir, and president of this national association.

The **Chairman**. Thank you very much.

Are there any questions of this witness?

Judge **Klein**. It doesn't look like there is anybody here to ask. [Laughter.]

The **Chairman**. If there are no questions from this witness, we thank you very much, Judge Klein, for appearing.

Judge **Klein**. Thank you, sir.

[Material follows:]

PREPARED STATEMENT OF THE HON. JOAN DEMPSEY KLEIN

It is with extreme pleasure that I appear before this honorable Committee to speak on behalf of the confirmation of the first woman nominee to the United States Supreme Court in its 191 years of existence. It is indeed a glorious occasion for women everywhere, and in particular for the women judges of America.

I am before you in my capacity as President of the National Association of Women Judges, an association with which over one-half of the nation's female federal and state judges have affiliated, along with a number of male judges.

The purposes of the National Association of Women Judges are as follows:

> ". . .[T]o promote the administration of justice; to discuss legal, educational, social and ethical problems mutually encountered by women judges and to formulate solutions; to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society; and, to address other important issues particularly affecting women judges. . . ."

As you might well imagine, the appointment of a woman to assume a rightful seat on the highest court has had top priority on our agenda. It seems to have been such a long time coming, but when considered in historical perspective, perhaps the 191 years is a reasonable period of time.

The legal roots of this nation are in the English common law and that law classified women in the same category as chattels, children and incompetents. As a consequence, women's activities outside the home were extremely restricted, including the opportunity to become educated. Even so, Myra Bradwell qualified herself, but she was denied a license to practice law by the State of Illinois in 1873. In refusing her that right, the Supreme Court said:

> "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.
>
> "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . ."

The cherished words of the Declaration of Independence that "all men are created equal" and are entitled to the "unalienable rights [of] life, liberty and the pursuit of happiness" -- were written with only white males in mind. From the beginning, women have had to wage a constant struggle to participate in "civil life." A constitutional amendment was required just 61 years ago to allow women to engage in the most basic and sacred right in a democracy -- the right to vote. Although adopted in 1868, the much heralded clause in the 14th Amendment guaranteeing "all persons" the equal protection of the laws has not protected women from laws that discriminate against women on the basis of sex. It was not until 1971 that the United States Supreme Court declared unconstitutional a blatantly sexually discriminatory state law because it violated the 14th Amendment.

Societal changes in the lives of American women have come about slowly but surely. Compared to our mean beginnings, the changes are of staggering proportions. Women constitute over 42% of the nation's work force, and over 50% of all women are gainfully employed outside the home. Women are seeking professional training in law and medicine and are participating in political decision-making in ever-increasing numbers. Today's factual knowledge of women indicates that indeed they are engaged in all aspects of "civil life."

However, as timely as we consider this appointment to be, and as eager as we are to have such an appointment become a reality, we are emphatic that the woman selected be of the highest caliber. By virtue of the fact that so many of us have been the "first woman judge" or the "only woman judge" in any number of situations, we are keenly aware of the spotlight focused on our every act, and the scrutiny to which we are continually subjected. Such attention will be magnified in the case of the "first woman justice on the Supreme Court!" Her performance will reflect on all of us lesser judicial luminaries, and we want to be assured that she has the capacity to succeed.

For these reasons and more, I am very pleased to report that the National Association of Women Judges finds the nominee, the Honorable Sandra Day O'Connor, to be exceptionally well qualified.

Certain selected Association members participated in the evaluation of Judge O'Connor and made the customary inquiries relating to professional competency, judicial temperament and integrity.

In addition, each of the 14 district directors of the Association from throughout the country were contacted, and each one commented favorably on Judge O'Connor and urged my appearance on her behalf before this honorable body.

The investigation disclosed among other data that Judge O'Connor is 51 years of age, mature, yet youthful, and possessed of great vitality and good health. She graduated from Stanford Law School, one of the most prestigious institutions of legal education in the world, where she was a member of Law Review, and graduated Order of the Coif in 1952.

Her diversified legal/judicial career includes service as a deputy county attorney in California, a civil lawyer for the Quartermasters Corps of the United States Army, private practice, and an assistant state attorney general in Arizona.

Judge O'Connor rather uniquely also served in the Arizona State Senate, where her colleagues elected her majority leader.

Following her legislative career, she presided as a trial judge in the superior court until her elevation to the Arizona Court of Appeals. She was sitting with distinction as an associate judge on the appellate court at the time President Reagan made his momentous decision to name a woman to the highest court. During that time, she authored some 29 opinions, which are described as concise and cogent, orderly, lucid and logical. I have read several of them and would agree with that analysis.

Judge O'Connor's experience on the appellate bench serves to prepare her for the work ahead. By contrast, at least 15 of the prior 101 Supreme Court justices had no judicial experience whatsoever, or a bare minimum prior to their appointments. These numbers include three of the justices currently serving with distinction.

In discussing Judge O'Connor with persons who either know her personally or who have knowledge of her, certain words keep recurring -- brilliant, fair, pragmatic, rational, hard-working, self-confident, flexible, conscientious, tough, and perfectionist. She has a reputation as an evenhanded, no-nonsense person with a precise legal mind, given to judicial restraint.

Her integrity is above reproach and she is financially sound. She is a stable, moderate, gracious, and well-adjusted woman. With her high degree of professional competency, innate intelligence and passion for hard work, she has every potential for becoming an outstanding Supreme Court Justice. As the first justice with experience in all three branches of government -- executive, legislative and judicial -- and as a woman -- she will bring to the high court a valuable perspective it has lacked to date.

In conclusion, I reiterate my pleasure at participating in this historical event on behalf of the National Association of Women Judges. We hereby set forth our evaluation with the finding that Judge O'Connor is exceptionally well qualified to this honorable Committee for its consideration. We urge the immediate confirmation of Judge O'Connor so that she can be in place and ready to proceed on "The First Monday in October."

Respectfully submitted,

Joan Dempsey Klein

Joan Dempsey Klein,
Presiding Justice,
California Court of Appeal;
President,
National Association of Women Judges

The CHAIRMAN. In view of the fact that there is a vote on now and the 5-minute bell will come on any second, Dr. Willke and Dr. Gerster, we will ask you to come back at 2 o'clock if you will and continue your testimony at that time.

We will now take a recess until 2 o'clock.

[Whereupon, at 1 p.m., the committee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The Judiciary Committee will come to order.

We shall now continue with the testimony of Dr. Willke and Dr. Gerster. Senator Denton of Alabama I believe is next in line for questioning.

TESTIMONY OF DR. J. C. WILLKE AND DR. CAROLYN F. GERSTER, NATIONAL RIGHT TO LIFE COMMITTEE—Resumed

Senator DENTON. Thank you, Mr. Chairman.

Good afternoon, Dr. Willke, Dr. Gerster. I would like to begin by expressing my gratification that the dialog that has been taking place, that respective points of view on the subject of abortion are being presented so well, by parties at this dais and by you two.

I certainly agree with you that it is a basic issue, one which is about as single an issue as whether or not murder is disqualifying if one has that habit, but for those who do not see it as you do and as I do, I certainly do not feel any sense of condemnation. I only hope that we can keep dialoging about it until we have enough of us thinking the truth about it, and I am not sure that I come down in precisely the right spot myself.

I am sorry that all the Senators did not hear the answers to some of the questions and some of the dialog, especially between Senator Metzenbaum and you two, and the answers to Senator Grassley's questions.

I have been thrust into this abortion issue since arriving at the Senate, without any intent on my part to be so involved, by virtue of being on the Aging, Family, and Human Services Subcommittee, and in that capacity have had to address family planning, title 10, and have had a bill which I originated passed, called "Adolescent Family Life," which sort of reverses the context of the Government's up to now involvement in sex education, adolescent pregnancy, that sort of thing.

Whether or not that law gets appropriated in the new crunch that we have economically is going to be another question, but it was passed unanimously on Labor and Human Resources Committee with Senator Metzenbaum and Senator Kennedy and others voting for it. My problem is in communicating to the other Senators and Congressmen this situation. It is misperceived. Once they understand it, everything is fine.

I share your concern. I have learned in that program, for example, in the hearings that we had on that, that a half a million teenagers are aborting their children per year and the number is going up every year. Therefore, Judge O'Connor's position that she disapproves of abortion as a means of birth control unfortunately is not being applied from within our own Government now because the way title 10 is administered, these girls are counseled to get abortions. The two diseases are expressed to them as venereal disease and pregnancy; the two cures are penicillin and abortion. Therefore, it has been a somewhat dismaying experience, and if my little bill does not get funded it will be even more dismaying.

I think Senator Metzenbaum started out the real dialog when he said that his concern is for the living, and that he felt compassion for those who were poor and already had enough children and things like that. You all made the point so well that the child in the womb is also living, and especially in the case of one which is old enough or far enough developed to be taken from the womb and live, it is very difficult not to interpret abortion in that case as murder.

It is not too far an extension to that to get to the point where, well, if you want to take care the poor, if you have four children and a couple of them are under 2 years old, maybe the best thing to do is gas them. As you well know, in other societies which are not based upon compassion, not based upon respect for the dignity of life and the equality of that life, we do have such manifestations as in Nazi Germany: abortion first, then euthanasia and infanticide, as we have in this country to a great degree already, and then the killing of the Jews selectively, the extermination of the mentally retarded, the physically disadvantaged, all of which took place within the lifetimes of many of us.

My own special consciousness, probably unique in this room, comes from the fact that I lived in a similar society for almost 8 years and I saw the result of what happens, human being to human being, when there is no principle derived from a concept of God, when there is atheism, when the government is totalitarian. I saw people killed because of political dissidence. I saw them tortured. I saw a man's eye cut out slowly, a North Vietnamese, because of his political disagreement with what the North Vietnamese were doing.

We now have the horrible tragedy of tens of millions of Southeast Asians enslaved to that system, which is even a greater slavery or a worse form of slavery than that which you referred to, Dr. Willke, in our own country. As hideous as that form was, it was not so hideous as to cause the slaves to get on logs, overburdened boats and flee with less than a 50-percent chance of survival in terms of their lives.

My disagreement with Senator Metzenbaum would devolve in a number of places but particularly when he talks about violence, say in El Salvador. As I said in my senatorial campaign in Alabama, the Civil War involved the highest rate of casualties per troop engaged of any war in recorded history. While war is hell, as Sherman said, there are worse forms of hell. There are forms of hell that last longer, kill more people, cause more suffering. Slavery was one of those.

As an Alabamian, as a white person, I believe that the Civil War to the degree that it was caused by slavery was well worth the candle. I believe that the war in Vietnam, to the degree that it was caused by the impulse to try to protect those whom we were pledged to protect against this kind of slavery, even worse than that other, was worth the candle. I am sorry that we have become disoriented in that respect. I hope we recover orientation in that respect.

That Soviet or totalitarian, Communist system has no respect for equality, no respect for human life. I was more sorry for those among whom I found myself who were so-called free than I was for my fellow prisoners.

If we do not realize once and for all what our Founding Fathers did and get back to seeing free enterprise in all of its senses—not just economic but the freedom to grow flowers if one wishes, the freedom to play the violin for one's own enjoyment or the enjoyment of others if one so wishes, the freedom to try to become President of the United States if one so wishes—and have that all permitted by a spirit of compassion, consideration for the rights of others derived from a "love thy neighbor as thy love thyself" concept, not to appreciate that as I grew to appreciate it watching the suffering of people committed to another system by no will of their own—were they able to vote, they would vote out of it—it makes me particularly ill to see our own society losing sight of what it is that has been passed on to them.

What is the genius of the Founding Fathers? What is the germ from which this greatness grew? That is what we are dealing with when we deal with the subject of abortion, in my opinion. I think you are entirely justified in saying that it is a once-in-a-century type issue, very similar to slavery, I think even more basically fundamental than the issue of slavery.

I would ask you both—perhaps Dr. Willke first—what do you think is the effect and what do you think is the significance of the *Roe* v. *Wade* decision as it relates to the power of Congress now to act perhaps without a constitutional amendment? What do you see as the power of Congress to right the present situation, in view of *Roe* v. *Wade*? What are the constraints and possibilities that you see?

Dr. WILLKE. Senator Denton, clearly *Roe* v. *Wade* established by that edict, we call it, three brandnew issues. The first thing it did was remove legal personhood on the basis of place of residence. Let me explain that.

I mentioned a bit earlier that abortion is legal until birth, and that is true. A person cannot be convicted of a crime if that physician kills a baby even while the mother is in labor, but as soon as that child enters the air world and is detached from the mother, birth is completed, then all of the civil rights of this Nation descend to apply and hover about to protect that child, for the child now is a legal person and has civil rights.

Therefore, we call abortion discrimination on the basis of the place of residence. If you will pardon the vernacular, if the kid can escape from that little house the night before his scheduled execution, his life can be saved, for the womb has become a tomb. That was one finding, legal personhood. The loss of that reduced the unborn child to the status of property of the owner.

The second major finding of *Roe* v. *Wade* was the creation of a brand new right. That right, called a right of privacy, is perhaps more accurately described as a right of private killing for it gave to a mother a right that had never existed before, that was not written in the 14th amendment but the Justices said that it was meant by the 14th amendment: That was the right to privately ask for the killing of her unborn, the only restriction being that a physician had to do it. That right may well be superior even to personhood, if that were capable of being restored by this Congress. That issue is controversial; there are differing opinions.

Finally, there was a third holding that gave the State a "compelling" interest in the maintenance of the mother's "health." About an hour ago I defined "health" as defined by the Supreme Court. Therefore, it could well be that a State court, interpreting "health" in that broadest sense of social distress, might rule on the basis of *Roe* v. *Wade*, *Doe* v. *Bolton*, that to maintain a woman's health there had to be abortion on demand.

Now the question: What can the Congress do? Clearly the final answer, the one equivocal answer, the one that is out there and the one that we all seek is a constitutional amendment so worded that it will reverse all three of those findings. That is within the power of Congress to report that amendment out. It takes two-thirds of both Houses, and this is what we have been asking for.

There is some disagreement, some controversy as to the wording of that, and we will shortly have full hearings on that, a fact that you are only so well aware of. We are going to be further enlightened on that score.

We plead with the Congress to do that, for at the moment we live in a Nation that is totally polarized on this issue. Unlike other issues in the body politic, there is no midground, there is no compromise. A baby is either a baby or not, either alive or dead. While the issue becomes more and more important in our Nation, the polarizations also rise.

What exists today in law, through a Court decision, is one extreme polarity of value judgment: Abortion on demand until birth, in all 50 States. It could not be worse. What we are asking for is the opposite polarity: Equal protection by law for all living Americans from the time their human life begins at fertilization. There is a yawning gulf between the two.

We plead with Members of Congress, the House and Senate, to please quit imposing their morality on the Nation by doing nothing, for by doing nothing they maintain the status quo. You see, a Member of either House would not necessarily have to be either pro or con on the issue; all they would have to be is, "I believe the people should decide, and therefore I will report out the amendment that the right-to-life people want, recognizing it to be that other polarity."

That could be a Senator's solemn duty even though they disagreed with the amendment. The simple concept would be, send it to the States, let the people decide. If in fact three-fourths of the States do ratify, that clearly is the wish of this Nation. If three-fourths cannot, they have had their chance. We would suggest that without question is where we hope this will be.

Senator DENTON. Dr. Gerster, would you care to comment, particularly with respect to some of the previous glimmerings you gave us into children being born alive, or, you know, that sort of gory reality about abortion which *Roe* v. *Wade* made possible?

Dr. GERSTER. I believe that Dr. Willke has really said it all. I think what has happened is, as Albert Schweitzer once said, "When you lose respect for any part of life, you lose respect for all of life."

The National Right to Life Committee is, of course, as involved in euthanasia and nontherapeutic human experimentation without informed consent or done on individuals incapable of informed consent, whether they are prisoners or children or retarded.

Probably the most dangerous words in *Roe* v. *Wade* were the words "meaningful life," because it opened the doors to reclassification of human beings whose lives were other than meaningful. As you mentioned yourself very movingly the reason for your involvement in this issue, my involvement stemmed from the fact that my husband was born and raised in Hitler's Germany during the Third Reich. I for this reason developed a hunger for knowledge about what happened to the German people and the German medical community.

I think the tragedy that is not appreciated in this country is that the euthanasia program that you alluded to in Germany was planned, not by Nazis, but by physicians, mostly psychiatrists and pediatricians. The plans were put forth in a book written in 1920 by Benigen Holke, and the words, "Lebens Unvertichs Leben," life not worth living, first appear in that book, 13 years before the world had ever heard of Adolf Hitler.

By reclassifying human beings it could be predicted, not only the euthanasia programs that are a reality in America regarding the born, handicapped children of all ages, but in the realm of human experimentation, I testified earlier probably the worst example regarding the premature baby with the decapitation and cannulation of the internal carotid artery of the heads of the infants born alive, but I recall another group of human beings that were reclassified.

They were retarded children at Willowbrook, and a very famous scientist, Dr. Saul Krugman, in developing hepatitis vaccine injected 25 children at Willowbrook Home for Retarded with living hepatitis-B. Nobody died. However, the defense, I think, of the experiment as it appeared, as I recall, in an article in the Journal of the American Medical Association, was that conditions were so bad at Willowbrook that the children probably would have developed hepatitis anyway. I will always remember that, I think, as so representative of what we term the antilife philosophy. The obvious, positive solution was to clean up conditions at Willowbrook.

However, worse than that, I recall the defense of the experiment in the New England Journal of Medicine. Many may ask what this has to do with abortion. It has a lot to do with abortion because we have agreed to take life, knowing that it was life. What I am describing now is not part of the Neuremberg trials; it is American medicine in this century.

At any rate, the comment regarding experimentation on the retarded that appeared in the New England Journal was—and I do not have to look at any note. It is engraved on my heart—it was that if we are about to study disease in children, there is no substitute for experimentation on children; that the only question is whether we are to do the initial experiments in children and adults with potential, or children who are human in form only. I suggest to you that those words are echoes of the Neuremberg doctors' trials in 1947.

If I could just close with one sentence, it would be the remarks of a physician with remarkable foresight. In the midnineteenth century, Dr. Hufflin said, "When a physician presumes to take into consideration in the course of his practice whether life has value or not, the possibilities are limitless, and the physician becomes the most dangerous man in the State."

Senator DENTON. Thank you, Dr. Gerster.

Dr. Willke, you have had a lot of experience with abortions with babies born alive. I would ask, before you undertake your mention of that, I would ask the chairman that an article in the Philadelphia Inquirer of August 2, 1981 in the Today Sunday insert, "Abortion: The Dreaded Complications," by Liz Jeffries and Rick Edmunds, be entered in the record of these proceedings, sir. I have the reference here in writing.

The CHAIRMAN. I just wondered if you want it in the printed record, or would you just want it in the records of the committee?

Senator DENTON. The printed record, sir.

The CHAIRMAN. What is the length of it? How long is it? Do you have a copy of it there?

Dr. WILLKE. Mr. Chairman, I have a copy here if you care to examine it. It is perhaps three or four pages in a Sunday supplement here.

The CHAIRMAN. We are really not having a hearing on abortion; we are having a hearing on the question of the fitness of the nominee, and I think it is all right to ask questions, any question you want to, but I do not want to go into great depth on any one side issue and fill up the record with that. I am just wondering, if this is just a short article we might put it in; if it is not, then I would suggest we put it in the files of the committee, and it could be reserved there until you do have questions on the subject of abortion.

Senator DENTON. The only relevance, Mr. Chairman, that I would suggest is that the point has been made that this is a single-issue matter similar to gun control or tobacco tax or something like that, and I believe that—I do not intend to fill up the proceedings or the record. It is entered with respect to that issue, to indicate that it is an issue of a century and perhaps the issue of our history, if we continue going this way.

Before you start, Dr. Willke——

The CHAIRMAN. Doctor, what is the length of that article?

Dr. WILLKE. Your lady is bringing it up there, Senator. I did not copy the line inches. I do not know. It starts about halfway through the supplement and, as I recall, it is several pages.

Senator DENTON. It contributes to placing in scale the degree of importance of this single issue. I defer to your judgment, Mr. Chairman. To save time, I would like to relate one quick anecdote in extension of the remarks made by Dr. Gerster.

Some of you here may have seen a television program, perhaps a year ago, showing an interview with a young man, 21 years old, who was about 38 inches high, had but one eye, one ear, no arm, was born that way, very deformed; had been left in a garbage can, the offspring of a British prostitute, found and brought into a home, a public home, to take care of orphans.

That child developed in that orphan home, felt despised, would bite people at age 16, spit at them and so forth, in a frenzy of hatred for humankind. At age 21, 5 years later, after having been adopted by a loving British couple who were very poor, he was a star student at Oxford, an extremely accomplished musician, an orator, won many debating contests in and around London, and was one of the happiest people I have ever seen in my life.

I understood that happiness because there were times when I, by all estimates that I would have made before I was in those conditions, would have considered I could not possibly be happy were I so disadvantaged, encumbered, and so forth. That young man was in the same sort of frame of mind. I have not recovered that since I have gotten back to normalcy but I had almost that degree of happiness as he had, and I understood that.

I kind of think it shows something about the relative importance of what might be called "meaningful life." Who would have defined what that lad would have been, at age 16? Would he not have been a leading candidate for experimentation or extermination in a system which neglects the infinite importance of respect for life?

Would you care to elaborate on those abortions, and that will be the last question I ask, Dr. Willke.

Dr. **WILLKE**. Senator Denton, the article which is written by two authors, both of whom admit that their position is in favor of abortion and continue that at the end of the article, details what is called the dreaded complication, that being a live birth from an induced abortion, very well researched.

It was in the Philadelphia Inquirer in the Sunday section, and simply what it says is that there is one live birth daily in the United States from attempted abortions. These are usually midtrimester abortions, most commonly of course by prostaglandin, which induces labor at no matter what stage of the pregnancy the woman is.

The point to be made here, I believe, is that this is legal. It is legal in all 50 States; it is legal in this United States, and I think it is important to bring that out because of the fact that these hearings are being held, and because of a series of laws that the nominee voted for which directly permit this sort of thing to happen. In fact, there was one live birth, very publicized, in Arizona just recently.

Dr. **GERSTER**. Yes, it led to a series of articles in the Arizona Republic, Arizona's leading newspaper. What had occurred was that a saline abortion had been attempted on a woman 32 weeks pregnant and the child, a little girl, was born alive at Doctor's Hospital. The doctor was not present at the abortion, and the nurse, succumbing to those basic instincts of nurses all over the world, took the baby to the nursery. The baby was later transported to St. Joseph's Hospital and was, a few weeks ago, released in perfect health.

There is a long string of circumstances that followed that case. A nurse of the abortionist called us and spoke about human experimentation, so I gave her the number of the reporter that had written the story.

It turned out that, as reported in the Arizona Republic, a pharmaceutical company that is usually famous for its vitamin pills, Squibb & Co., was reported in the Republic as having paid a large sum of money—reputed to be $10,000—to the abortionist, all legally, you understand, except for the fact that we have a fetal experimentation law in Arizona which some States do not have.

A large dose of antihypertensive agent which is being developed by Squibb was given to pregnant women. Amniotic fluid was drawn 2 to 3 days prior to the abortion. The abortion was to be a prostaglandin abortion because saline evidently interferes with the study. At the end of the time, Squibb had requested amniotic fluid, blood of the baby, blood of the mother, and a piece of the baby's liver.

I do not want to dwell on these things, and I know that the chairman has asked if this was not a peripheral issue. However, I think Senator Metzenbaum—who is no longer present, unfortunately—spent a great deal of time asking us why this to us is a more important issue than any other. The abortion of that 32-week-old baby was perfectly legal. There is no question that there are no criminal charges being brought against the doctor for the abortion.

In the State of Arizona we have an endangered species law. An individual that crushes a gila monster egg—this is one of the only two poisonous lizards left in the world—not the gila monster, only the egg—is subject to a fine of $750 and 4 months in jail, but you can kill a baby to 9 months in the State of Arizona with impunity. I suggest to this committee that when this becomes the law of the State, this is a sick society.

There was one bill that Senator O'Connor introduced which could be interpreted as a prolife bill, and I do not say this with any degree of levity. It was introduced on January 16, 1973. There was a great deal of publicity in Arizona, adverse publicity, because we were shooting buffalo in enclosures with high-powered rifles. It became the subject of a book by Mr. Swarthout, an Arizona author, and a famous motion picture called, "Bless the Beasts and the Children."

There was all sorts of outcry against this inhumanity to buffalo, and so Senator O'Connor introduced the following bill relating to "game fish, the taking of game animals under certain conditions." The purpose of the act was "to prohibit the shooting or taking of game animals in an inhumane manner."

Section A says that:

> Except as provided in subsection (b), the Commission shall not permit the taking or shooting of any game animal, including but not limited to buffalo, under any condition in which such animal is restrained in an enclosure of such a size as to prohibit its escape from the range of the weapon.

I suggest to you that the baby, if reclassified as a game animal, is certainly enclosed so as to prohibit escape.

Senator Denton. Thank you, too.

I want to say for the record that I know that this chairman is not edified by the fact that the Supreme Court committed an act of judicial activism. I believe he is of the opinion that they should not have. I regard all of his admonitions toward me as justified. I think he is the fairest chairman I have ever encountered.

I would like to thank him for his generosity and graciousness with respect to a rather prolonged effort to substantiate that abortion is an unusual single issue, one which eats away perhaps—at least in my belief—does eat away at the foundation of the theory which sustains this country. I believe that the opinions and prospective rulings of a Supreme Court Justice in this matter are pertinent to anyone's concern about the general welfare, and that is why I undertook such a long exploration into the subject.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator, what did you decide about that article? Do you want it to go in now or be placed with the records in the committee? How would you prefer to handle it.

Senator DENTON. We would like to put it in now, and we are not going to use it in any other way.

The CHAIRMAN. Without objection, so ordered.

[Material supplied follows:]

[From the Philadelphia Inquirer, Aug. 2, 1981]

ABORTION

(By Liz Jeffries and Rick Edmonds)

A woman's scream broke the late-night quiet and brought two young obstetrical nurses rushing to Room 4456 of the University of Nebraska Medical Center. The patient, admitted for an abortion, had been injected 30 hours earlier with a salt solution, which normally kills the fetus and causes the patient to deliver a mass of lifeless tissue, in a process similar to a miscarriage.

This time, though, something had gone wrong. When nurse Marilyn Wilson flicked on the lights and pulled back the covers, she found, instead of the still born fetus she'd expected, a live 2½-pound baby boy, crying and moving his arms and legs there on the bed.

Dismayed, the second nurse, Joanie Fuchs, gathered the squirming infant in loose bedcovers, dashed down the corridor and called to the other nurses for help. She did not take the baby to an intensive care nursery, but deposited it instead on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. Other nurses and a resident doctor gathered and gaped.

Finally, a head nurse telephoned the patient's physician, Dr. C. J. LaBenz, at home, apparently waking him.

"He told me to leave it where it was," the head nurse testified later, "just to watch it for a few minutes, that it would probably die in a few minutes."

This was in Omaha, in September 1979. It was nothing new. Hundreds of times a year in the United States, an aborted fetus emerges from the womb kicking and alive. Some survive. A baby girl in Florida, rescued by nurses who found her lying in a bedpan, is 5 years old now and doing well. Most die. The Omaha baby lasted barely 2½ hours after he was put in the closet with the dirty linen.

Always, their arrival is met with shock, dismay and confusion.

When such a baby is allowed to die and the incident becomes known, the authorities often try to prosecute the doctor. This has happened several dozen times in the past eight years, most recently in the case of Dr. LaBenz, who is to go on trial in Omaha this fall on two counts of criminal abortion. But interviews with nurses, some of them visibly anguished, uncovered dozens of similar cases that never reached public attention.

In fact, for every case that does become known, a hundred probably go unreported. Dr. Willard Cates, an expert on medical statistics who is chief of abortion surveillance for the Center for Disease Control in Atlanta, estimates that 400 to 500 abortion live births occur every year in the United States. That is only a tiny fraction of the nation's 1.5 million annual abortions. Still, it means that these unintended live births are literally an everyday occurrence.

They are little known because organized medicine, from fear of public clamor and legal action, treats them more as an embrassment to be hushed up than a problem to be solved. "It's like turning yourself in to the IRS for an audit," Cates said. "What is there to gain? The tendency is not to report because there are only negative incentives."

One result of the medical community's failure to openly acknowledge the problem is that many hospitals and clinics give their staffs no guidelines for dealing with abortion live births. Even where guidelines exist, they may not be followed. The doctor is seldom present when a live birth occurs, because most late abortions—those done later than the midpoint of pregnancy—are performed by the injection of a solution (the method used in the Omaha case) that slowly induces delivery of the fetus many hours later. Crucial decisions therefore fall to nurses and physician residents with secondary authority over the case.

Signs of life in the baby may or may not be recognized. At some hospitals a liveborn abortion baby is presumed dead unless it conspicuously demonstrates otherwise, by crying or waving its arms and legs. Even then, the medical personnel on the scene may let the baby die rather than try to save it.

Because they are premature, these infants need immediate care, including machine support, in order to live. Given such care, many can survive in good health, as did a pair of abortion babies born in separate incidents in Wilmington, Del., in the spring of 1979 and since adopted. Others are too premature to be saved even with the best care.

Whether they live or die, these abortion live births—and even successful, routine abortions of late terms, highly developed fetuses—are taking a heavy emotional toll on medical staffs across the country. Some physicians say they have "burned out" and have stopped doing abortions altogether. Nursing staffs at hospitals in Cleveland, Grand Rapids, Fort Lauderdale and elsewhere have rebelled at late abortions and have stopped their hospitals from performing any abortions later than the midpoint of pregnancy. Some staff members who regularly perform late abortions report having nightmares about fetuses, including recurring dreams in which they frantically seek to hide fetuses from others.

In legalizing abortion in 1973, the Supreme Court said it was reserving the right to protect the life of a viable fetus—that is, one with the potential to survive outside the womb. But the court never directly acknowledged the chance of an aborted fetus' being born alive, and it therefore never gave a clear guideline for dealing with what Dr. Thomas Kerenyi, a leading New York expert on abortions, has called "the dreaded complication."

Twenty states (including Pennsylvania, New Jersey and Delaware) have no laws limiting late abortions or mandating care for live-born abortion babies. Even where such state laws exist,
unconstitutional.

"Everyone—doctors, attorneys, state legislators—is looking for some clear guidelines concerning disposition of these infants," said Newman Flanagan, district attorney for the City of Boston. "If a baby has rejected an abortion and lives, then it is a person under the Constitution. As such, it has a basic right to life. Unfortunately, it is difficult to protect that right, because there are no guidelines addressed to this specific issue."

Medical trends indicate that abortion live births will continue. They may even become more frequent. For one thing, demand for late-term abortions is undiminished, and with the growing popularity of genetic testing to screen for fetal defects midway through pregnancy, educated and affluent women are now joining the young, the poor and the uninformed who have been, until now, the main groups seeking late abortions.

Furthermore, estimating the gestational age of a fetus in the womb—a crucial aspect of a successful abortion—remains an inexact art. In March, doctors at the Valley Abortion Clinic in Phoenix estimated that one woman was 19 to 20 weeks pregnant; days later she delivered not an aborted fetus but a 2½-pound, 32-week baby. It survived after two months of intensive care at a Phoenix hospital.

Finally, medical science in the past 10 years has greatly improved its ability to care for premature babies. Infants are becoming viable earlier and earlier. Those with a gestational age of 24 weeks and weighing as little as 1½ pounds can now survive if given the best of care.

So long as doctors perform abortions up to the 24th week of pregnancy (as is legal everywhere in the United States under the 1973 Supreme Court ruling), it is statistically certain that some of these borderline cases will turn out to be viable babies, born alive. It happened again last May in Chicago—a 19-to-20-week estimate, a live-born 2-pound baby boy.

By ignoring the problem of abortion live births, the courts and the medical establishment are choosing to overlook a long, well-documented history of cases:

January 1969, Stobhill Hospital, Glasgow, Scotland: A custodian heard a cry from a paper bag in the snow beside an incinerator. He found a live baby. It was taken inside and cared for in the hospital's operating theater but died nine hours later. The infant's gestational age had been estimated at 26 weeks by the physician performing the abortion. It was actually closer to 32 weeks. No efforts were made to check for signs of life before the aborted baby was discarded. No charges were filed.

Because the case had been written about in British medical journals, it was a matter of record—before abortion was legalized in this country—that such things could happen.

April 1973, Greater Bakersfield Hospital, Bakersfield, Calif.: A 4½-pound infant was born live following a saline abortion (induced by an injection of salt solution) performed by Dr. Xavier Hall Ramirez. Informed by phone, Dr. Ramirez ordered two nurses to discontinue administering oxygen to the baby. His instructions were countermandated by another doctor; the baby survived and later was placed for adoption. Ramirez was indicted for solicitation to commit murder. His attorney argued that a medical order based on medical opinion, no matter how mistaken, is privileged. Dr. Irvin M. Cushner of the University of California at Los Angeles, later to become a top health policy official in the Carter administration, testified that it was normal for Ramirez to expect the delivery of a dead or certain-to-die infant as the result of a saline abortion.

July 1974. West Penn Hospital, Pittsburgh: Dr. Leonard Laufe performed an abortion on a woman who contended she had been raped—though that and her account of when she became pregnant were later disputed. She had been turned down for an abortion at another hospital, where the term of her pregnancy was estimated at 26 to 31 weeks. Laufe put it at 20 to 22. The abortion, induced by an injection of prostaglandin, a substance that stimulates muscle contraction and delivery of the fetus, was filmed for use as an instructional film. The film showed the three-pound infant moving and gasping. Also, a nurse and a medical student testified that they had noticed signs of life. No charges were filed, however, after a coroner's inquest at which Laufe testified that the infant sustained fatal damage during delivery.

February 1975, Boston: Dr. Kenneth Edelin was convicted of manslaughter for neglecting to give care to a 24-week infant after a 1973 abortion at Boston City Hospital. Witnesses said Edelin held the infant down, constricting the flow of oxygen through the umbilical cord and smothering it. He was the first and only American doctor ever convicted on charges of failing to care for an infant born during an abortion. The conviction was overturned by the Massachusetts Supreme Court on the ground that improper instructions had been given to the jury. Edelin and his lawyer argued that he had taken no steps to care for the infant because it was never alive outside the womb.

March 1977, Westminster Community Hospital, Westminster, Calif.: A seven-month baby girl was born live after a saline abortion performed by Dr. William Waddill. A nurse testified that Waddill, when he got to the hospital, interrupted her efforts to help the baby's breathing. A fellow physician testified that he had seen Waddill choke the infant. "I saw him put his hand on this baby's neck and push down," said Dr. Ronald Cornelson. "He said, 'I can't find the goddamn trachea,' and 'This baby won't stop breathing.' " Two juries, finding Cornelson an emotional and unconvincing witness, deadlocked in two separate trials. Charges against Waddill were then dismissed. He had contended the infant was dying of natural causes by the time he got to the hospital.

July 1979, Cedars-Sinai Medical Center, Los Angeles: Dr. Boyd Cooper delivered an apparently stillborn infant, after having ended a problem pregnancy of 23 weeks. Half an hour later the baby made gasping attempts to breathe, but no efforts were made to resuscitate it because of its size (1 pound 2 ounces) and the wishes of the parents. The baby was taken to a small utility room that was used, among other things, as an infant morgue. Told of the continued gasping, Cooper instructed a nurse, "Leave the baby there—it will die." Twelve hours later, according to testimony of the nurse, Laura VanArsdale, she returned to work and found the infant still in the closet, still gasping.

Cooper then agreed to have the baby boy transferred to an intensive care unit, where he died four days later. A coroner's jury ruled the death "accidental" rather than natural but found nothing in Cooper's conduct to warrant criminal action.

A common thread in all these incidents is that life was recognized and the episode brought to light by someone other than the doctor. Indeed, there is evidence that doctors tend to ignore all but the most obvious signs of life in an abortion baby.

In the November 1974 newsletter of the International Correspondence Society of Obstetricians and Gynecologists, several doctors addressed a question from a practitioner who had written in an earlier issue that he was troubled by what to do when an aborted infant showed signs of life.

One was Dr. Ronald Bolognese, an obstetrician at Pennsylvania Hospital in Philadelphia, who replied:

"At the time of delivery, it has been our policy to wrap the fetus in a towel. The fetus is then moved to another room while our attention is turned to the care of [the woman]. She is examined to determine whether complete placental expulsion has occurred and the extent of vaginal bleeding. Once we are sure that her condition is stable, the fetus is evaluated. Almost invariably all signs of life have ceased."

(Bolognese recanted that statement in a 1979 interview. "That's not what we do now," he said. "We would transport it to the intensive care nursery.")

In addition, Dr. William Brenner of the University of North Carolina Medical School suggested that if breathing and movement persist for several minutes, "the patient's physician, if he is not in attendance, should probably be contacted and informed of the situation. The pediatrician on call should probably be apprised of the situation if signs of life continue."

Dr. Warren Pearse, executive director of the American College of Obstetrics and Gynecology, was asked in a 1979 interview what doctors do, as standard practice, to check whether an aborted fetus is alive.

"What you would do next [after expulsion] is nothing," Pearse said. "You assume the infant is dead unless it shows signs of life. You're dealing with a dead fetus unless there is sustained cardiac action or sustained respiration—it's not enough if there's a single heartbeat or an occasional gasp."

These seemingly callous policies are based on the assumption that abortion babies are too small or too damaged by the abortion process to survive and live meaningful lives. That is not necessarily the case, though, even for babies set aside and neglected in the minutes after delivery.

A nursing supervisor who asked not to be identified told of an abortion live birth in the mid-'70s in a Florida hospital. The infant was dumped in a bedpan without examination, as was standard practice. "It did not die," the nurse said. "It was left in the bedpan for an hour before signs of life were noticed. It weighted slightly over a pound."

The baby remained in critical condition for several months, but excellent care in a unit for premature infants enabled it to survive. The child, now 5 years old, was put up for adoption. The nursing supervisor, who has followed its progress, said she has pictures of the youngster "riding a bicycle and playing a little piano."

In the spring of 1979 two babies were born alive, five weeks apart, after saline abortions at the Wilmington Medical Center. They were given vigorous care, survived and were later adopted. One had been discovered by a nurse, struggling for breath and with a faint heartbeat, after having been placed in a plastic specimen jar. The second was judged to be a live delivery and was given immediate help breathing.

A baby girl, weighing 1 pound 11 ounces, was born in February 1979 after a saline abortion at Inglewood (Calif.) Hospital. Harbor General Hospital, which is associated with UCLA and is fully equipped to care for premature babies, was called for help, but the neonatal rescue team did not respond. The infant died after three hours.

The Los Angeles Department of Health Services investigated and was told that there had been confusion over the baby's weight and that it reportedly showed poor vital signs. It was "very unusual for them not to pick up [an infant] of this size," Dr. Rosemary Leake of Harbor General told investigators.

The administrator of a New York abortion unit, asked what would be done for a live-born abortion baby, said, "The nurses have been trained in how to handle this. I'd like to think we would do everything to save it. But honestly I'm not sure."

These incidents together suggest that life in an aborted infant may or may not be recognized. If it is, supportive treatment may or may not be ordered.

Such incidents, when discovered, often provoke prosecutions. A few may seem something like murder at first blush. But on closer inspection the doctors' actions have been judged, time and again, not quite to fit the definition of a crime.

Nowhere was this more vividly shown than in the case of Dr. Jesse J. Floyd, who was indicted on charges of murder and criminal abortion by a grand jury in Columbia, S.C., in August 1975. The charges were the result of an abortion a year earlier of a baby that appeared to have a gestational age of 27 to 28 weeks. It weighed 2 pounds 5 ounces and lived for 20 days.

In October 1979 the state dropped its case against Floyd. County prosecutor James C. Anders later conceded in an interview that South Carolina's abortion law was of dubious constitutionality. "In the second place," he said, "I had a reluctant witness [the infant's mother]. That and the passage of time worked against me."

A detailed record was developed in the case, as part of a federal suit that Floyd brought against Anders in which he sought to block the state prosecution. The 20-year-old mother, Louise A., lived in the small town of Hopkins, worked at a military-base commissary and had plans to enroll in a technical college. Those plans made her unwilling to have the baby she was carrying, so she presented herself for an abortion at Floyd's office in July 1974. Court records indicate that she had been told erroneously by her hometown doctor's nurse that she was not pregnant, and that she only slowly realized that she was.

Floyd found her to be past the first trimester of pregnancy, and under South Carolina law that meant an in-hospital abortion would be required. There were delays in her raising $450 for the abortion and more delays in admitting her to Richland Memorial Hospital. She was injected with prostaglandin on Sept. 4 and expelled the live baby early on the morning of Sept. 6.

"I started having real bad labor pains again," Louise recalled in her deposition, "and finally my baby was born. I called the nurse. Then about four or five of them came in the room at the time. The head nurse came in the same time the other nurses came in and she told me did I know that the baby was a seven-month baby. I told her no.

"One of the nurses said that the baby was alive. They took the baby out of the room. He never did cry, he just made some kind of a noise."

The first doctor on the scene, paged from the cafeteria, was a young resident. She did not hesitate. On detecting a heartbeat of 100, she clamped and severed the umbilical cord and had the baby sent to the hospital's intensive care unit.

"It was a shock, a totally unique emergency situation, very upsetting to all of us," the doctor, who now practices in California, said in an interview. "Some people have disagreed with me [about ordering intensive care for an abortion live birth] but that seems to me the only way you can go.

"It's like watching a drowning. You act. You don't have the luxury of calling around and consulting. You institute life preserving measures first and decide about viability later on."

Ten days after birth, the baby had improved markedly and was given a 50-50 chance of survival. Then he developed a tear in the small intestine and died of that and other complications on Sept. 26.

Louise A. never saw the child. She checked out of the hospital two days after the abortion and did not return. But she did show a passing interest in the baby's progress.

"I kept calling this nurse," Louise said in her deposition. "I would call . . . and get information from them about the baby, and they told me he was doing fine. They told me he had picked up two or three pounds. I started going to school, and one afternoon I called home and they told me the baby had died, but no one told me the cause of his death."

Floyd never saw the infant either. On the day of the abortion, his hospital privileges at Richland were withdrawn, and they have never been restored.

These circumstances presented prosecutor Anders with a difficult case. Floyd had had no physical contact with the live-born infant, nor was he issuing orders concerning its care. Nonetheless, Anders thought the doctor could be held responsible for the infant's death.

Anders pressed his murder charge using an old English common-law theory. Under this theory, willfully doing damage to a "vital" infant in the womb could be considered a crime against the fetus as a person. The abortion itself, Anders alleged, was an assault.

The line of argument is not entirely farfetched. For instance, a Camden, N.J., man was convicted of murder in 1975 after he shot a woman in the abdomen late in her pregnancy, causing the dealth of the twins she was carrying. But application of the theory to abortion had never been tested—in South Carolina or anywhere else.

South Carolina law in the mid-1970s prohibited third-trimester abortion unless two other doctors certified that the abortion was essential to protect the life or health of the mother. No such certifications were made for Louise. However, various Supreme Court rulings suggested that both the requirement of consultation with other doctors and the explicit definition of viability (as beginning in the third trimester) would make that law unconstitutional.

Floyd's lawyers, George Kosko of Columbia, S.C., and Roy Lucas of Washington, also filed voluminous expert affidavits on the difficult of estimating gestational age accurately. At worst, they argued, Floyd had made a mistaken diagnosis. What proof was there that he had intentionally aborted a viable baby?

District Court Judge Robert Chapman and the Fourth Circuit Court of Appeals agreed that the prosecution was based on flimsy evidence and should be blocked. However, the Supreme Court disagreed, in a ruling in March 1979, and suggested that judgment should be withheld on constitutional matters until the state prosecution had run its course. The way was thus cleared for Anders to proceed, but with witnesses dispersed, memories fading and the legal basis for prosecution still doubtful, Anders chose to drop the case.

Floyd, 49, continues performing first-trimester abortions at his Ladies Clinic, but the loss of hospital privileges and the damage to his reputation caused his surgical practice to collapse, he said.

The long legal proceeding also seems to have had a chilling effect on abortion practice throughout South Carolina, which Anders concedes was one of his intentions.

"The main thing is the dilemma it puts the other physicians in," Floyd said in an interivew. "It's just about dried up second-trimester abortions in this state. I have to send mine to Atlanta, Washington or New York."

Asked about late abortions and the risk of live births, Floyd said he thought abortions performed through the sixth month of pregnancy create "a problem to which there isn't an answer. We probably need to move back to 20 weeks. I would be reluctant to do one now after 20 weeks."

A similar case occurred about the same time in South Carolina, when Anders obtained a criminal indictment charging Dr. Herbert Schreiber of Camden, S.C., with first-degree murder and illegal abortion.

On July 18, 1976, a month after the charges had been filed, the 60-year-old doctor was found dead in a motel room in Asheville, N.C. A motel maid discovered the body slumped in a chair. Several bottles of prescription drugs were recovered from the room. Two days later the Buncombe County medical examiner ruled the death a suicide from a drug overdose.

Schreiber, who left no not, had pleaded not guilty to the charge of having killed a live baby girl after an abortion by choking or smothering her to death.

Comparing the Floyd and Schreiber cases, Anders found an irony: Schreiber "just reached in and strangled the baby," the prosecutor said his evidence showed. "I charged him with murder, and he committed suicide. If he had been willing to wait, he probably would have been OK too"

Not every doctor who performs a late abortion has to confront an aggressive prosecutor like Anders. But even those abortion live births that escape public notice raise deeply troubling emotions for the medical personnel involved. "Our training disciplines you to follow the doctor's orders," explained a California maternity nurse. "If you do something on your own for the baby that the doctor has not ordered and that may not meet with his commitment to his patient, the mother can sue you. A nurse runs a grave risk if she acts on her own. Not only her immediate job but her license may be threatened."

Nonetheless, nursing staffs have led a number of quite revolts against late abortions. Two major hospitals in the Fort Lauderdale areas, for instance, stopped offering abortions in the late 1970s after protests from nurses who felt uncomfortable handling the lifelike fetuses.

A Grand Rapids, Mich., hospital stopped late-term abortions in 1977 after nurses made good on their threat not to handle the fetuses. One night they left a stillborn fetus lying in its mother's bed for an hour and a half, despite angry calls from the attending physician, who finally went in and removed it himself.

In addition, a number of hospital administrators have reported problems in mixing maternity and abortion patients—the latter must listen to the cries of newborn infants while waiting for the abortion to work. And it has proved difficult in general hospitals to provide round-the-clock staffing of obstetrical nurses willing to assist withg the procedure.

One young nurse in the Midwest, who quit to go into teaching, remembers "a happy group of nurses" turning nasty to each other and the physicias because of conflicts over abortion. Ond day, she recalled, a woman physician "walked out of the operating room after doing six abortions. She smeared her hand [which was covered with blood] on mine and said,'Go wash it off. That's the hand that did it.' "

Several studies have documented the distress that late abortion causes many nurses. Dr. Warren M. Hern, chief physician, and Billie Corrigan, head nurse, of the Boulder (Colo.) Abortion Clinic, presented a paper to a 178 Planned Parent-hood convention entitled "Waht About Us? Staff Reactions . . ."

The clinic, one of the largest in the Rocky Mountain states, specializes in the D&E (dilation and evacuation) method of second-trimester abortion, a procedure in which the fetus is cut from the womb in pieces. Hern and Corrigan reported that eight of the 15 staff members surveyed reported emotional problems. Two said they worried about the physician's psychological well-being. Two reported horrifying dreams about fetuses, one of which involved the hiding of fetal parts so that other people would not see them.

"We have produced an unusual dilemma," Hern and Corrigan concluded. "A procedure is rapidly becoming recognized as the procedure of choice in late abortion, but those capable of performing or assisting with the procedure are having strong personal reservations about participating in an operation which they view as destructive and violent."

Dr. Julius Butler, a professor of obstetrics and gynecology at the University of Minnesota Medical School, is concerned about studies suggesting that D&E is the safest method and should be used more widely. "Remember," he said, "there is a human being at the other end of the table taking that kid apart.

"We've had guys drinking too much, taking drugs, even a suicide or two. There have been no studies I know of of the problem, but the unwritten kind of statistics we see are alarming."

"You are doing a destructive process," said Dr. William Benbow Thompson of the University of California at Irvine. "Arms, legs, chests come out in the forceps. It's not a sight for everybody."

No all doctors think the stressfulness is overwhelming. The procedure "is a little bit unpleasant for the physician," concedes Dr. Mildred Hanson, a petite woman in her early 50s who does eight to 10 abortions a day in a clinic in Minneapolis, just a few miles across town from where Bulter works. "It's easier to . . . leave someone else—namely a nurse—to be with the patient and do the dirty work.

"There is a lot in medicine that is unpleasant" but necessary—like amputating a leg—she argues, and doctors shouldn't let their own squeamishness deprive patients of a procedure that's cheaper and less traumatic.

However, Dr. Nancy Kaltreider, an academic psychiatrist a the University of San Francisco, has found in several studies "an unexpectedly strong reaction" by the assisting staff to late-abortion procedures. For nurses, she hypothesizes, handling tissues that resemble a fully formed baby "runs directly against the medical emphasis on preserving life."

The psychological wear-and-tear from doing late abortions is obvious. Philadelphia's Dr. Bolognese, who seven years ago was recommending wrapping abortion live-borns in a towel, has stopped doing late abortions.

"You get burned out," he said. Noting that his main research interest is in the management of complicated obstetrical cases, he observed: "It seemed kind of schizophrenic, to be doing that on the one hand [helping women with problem pregnancies to have babies] and do abortions."

Dr. John Franklin, medical director of Planned Parenthood of Southeastern Pennsylvania, was the plaintiff in a 1979 Supreme Court case liberalizing the limits on late abortions. He does not do such procedures himself. "I find them pretty heavy weather both for myself and for my patients," he said in an interview.

Dr. Kerenyi, the New York abortion expert, who is at Mt. Sinai Hospital, has similar feelings but reaches a different conclusion. "I first of all take pride in my deliveries. But I've seen a lot of bad outcomes in women who did not want their babies—so I think we should help women who want to get rid of them. I find I can live with this dual role."

The legal jeopardy, the emotional strain, the winking neglect with which "signs of life" must be met—all these things nurture secrecy. Late abortions take place "behind a white curtain," as one prosecutor put it, well sheltered from public view.

Only one large-scale study has been done of live births after abortions—by George Stroh and Dr. Alan Hinman in upstate New York from July 1970 through December 1972 (a period during which abortion was legal in New York alone). It turned up 38 cases of live births in a sample of 150,000 abortions.

Other studies, including one that found signs of life in about 10 percent of the prostaglandin abortions at a Hartford, Conn., hospital, date from the mid-1970s. No one is so naive as to think there is reliable voluntary reporting of live births in the present climate, according to Dr. Cates of the Center for Disease Control.

Evidence gathered during research for this story suggests, without proving definitively, that much of the traffic in later abortions now flows to the New York and Los Angeles metropolitan areas, where loose practice more easily escapes notice.

"The word has spread," the Daily Breeze, a small Los Angeles suburban paper, said in July 1980, "that facilities in greater Los Angeles will do late abortions. How late only the woman and the doctor who performs them know."

This kind of thing is disturbing even to some peole with a strong orientation in favor of legal abortion. For instance, the Philadelphia office of CHOICE, which describes itself as "a reproductive health advocacy agency," will recommend only Dr. Kerenyi's service at Mt. Sinai among the half-dozen in New York offering abortion up to 24 weeks. The others have shortcomings in safety, sanitation or professional standards, in the agency's view.

An internal investigation of the abortion unit at Jewish Memorial Hospital in Manhattan, showed that six fetuses aborted there in the summer of 1979 weighed more than 1⅓ pounds. The babies were not alive, but were large enough to be potentially viable. A state health inspector found in June 1979 that the unit had successfully aborted a fetus that was well over a foot long and appeared to be of 32 weeks gestation. Hospital officials confirmed in an interview that later in 1979 a fetus weighing more than four pounds had been aborted.

"It's disconcerting," Iona Siegel, administrator of the Women's Health Center at Kingsbrook Jewish Medical Center in Brooklyn, said of abortions perfomed so late that the infant is viable. When Ms. Siegel hears, as she says she often does, that a patient turned away by Kingsbrook because she was past 24 weeks of pregnancy had an abortion somewhere else, "that makes me angry. Number one, it's against the law. Number two, it's dangerous to the health of the mother."

Though one might expect organized medicine to take a hand in bringing some order to the practice of late abortions, that is not happening.

"We're not really very pro-abortion," said Dr. Ervin Nichols, director of practice activities for the American College of Obstetrics and Gynecology. "As a matter of fact, anything beyond 20 weeks, we're kind of upset about it."

If abortions after 20 weeks are a dubious practice, how does that square with abortion up to 24 weeks being offered openly in Los Angeles and New York and advertised in newspapers and the Yellow Pages there and elsewhere?

"That's not medicine," Nichols replied. "That's hucksterism."

Cates, of the Center for Disease Control, concedes that he has ambivalent feelings about those who do the very late procedures. There is obviously some profiteering and some bending of state laws forbidding abortions in the third trimester. But since late abortions are hard to get legally in many places, Cates puts a low priority on trying to police such practices. Medical authorities leave the late-abortion practitioners to do what they will. And so, too, by necessity, do the legal authorities.

The Supreme Court framed its January 1973 opinion legalizing abortion around the slippery concept of viability. As defined by Justice Harry Blackmun in the landmark *Roe* v. *Wade* case, viability occurs when the fetus is "potentially able to live outside the mother's womb albeit with artificial aid."

The court granted women an unrestricted right to abortions, as an extension to their right of privacy, in the first trimester of pregnancy. From that point to viability, the state can regulate abortions only to make sure they are safe. And only after a fetus reaches viability can state law limit abortion and protect the "rights" of the fetus.

"Viability," Blackmun wrote, after a summer spent researching the matter in the library of the Mayo Clinic, "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

The standard was meant to be elastic, changing in time with medical advances. Blackmun took no particular account, though, of the possibility of abortion live births, or of errors in estimating gestational age.

In subsequent cases, the high court ruled that:

A Missouri law was too specific in forbidding abortion after 24 weeks. "It is not the proper function of the legislature or the court," Blackmun wrote, "to place viability, which essentially is a medical concept, at a specific point in the gestational period."

A Pennsylvania law was too vague. The law banned abortions "if there is sufficient reason to believe that the fetus may be viable." The court said it was wrong to put doctors in jeopardy without giving them clearer notice of what they must do.

State laws could not interfere with a doctor's professional judgment by dictating the choice of procedure for late abortions or by requiring aggressive care of abortion live births.

According to a 1979 survey by Jeanie Rosoff of Planned Parenthood's Alan Guttmacher Institute, 30 states have laws regulating third-trimester abortions. Some of these laws prohibit or strictly limit abortions after the fetus has reached viability. Some require doctors to try to save abortion live-born babies. Only a few states have both types of laws.

In addition, a number of these laws have been found unconstitutional. Others obviously would be, in light of Supreme Court rulings. Virtually all the state laws would be subject to constitutional challenge if used as the basis of prosecution against an individual doctor.

New York and California, ironically, have among the strongest, most detailed laws mandating care for survivors of abortions. But these laws have proved only a negligible check on the abortion of viable babies.

"We've had a number of claims come up that a baby was born live and full effort was not given to saving it," said Dr. Michael Baden, former chief medical examiner of New York City. "We've not had cases of alleged strangulation (as with Dr. Waddill in California) and that surely must be rare. All [the doctor] has to do is nothing and the result is the same."

Alan Marrus, a Bronx County assistant district attorney, has investigated several live-birth cases and the applicable New York law. He has yet to find "a case that presented us with facts that warranted prosecution. You need an expert opinion that in fact there was life and that the fetus would have survived. Often the fetus has been destroyed—so there is nothing for your expert witness to examine."

The incidents only come to light at all, Baden and Marrus noted, if some whistle-blower inside the hospital or clinic brings them to the attention of the legal authorities. The credibility of that sort of witness may be subject to attack. And even if the facts do weigh against a doctor, he has some resources left. Almost always he can claim to have made no more than a good-faith error in medical judgment.

"This is happening all over the place" said a California prosecutor. "Babies that should live are dying because callous physicians let them die." But he despairs of winning any convictions. "Nobody's as dumb as Waddill. They're smarter today. They know how to cover themselves."

Unfortunately, advances in medical technique may only aggravate the overall problem. Fetuses are becoming viable earlier and earlier, while the demand for later abortions shows no sign of abating. Some argue that Justice Blackmun's definition of viability as "usually seven months" was obsolete the day it was published. It clearly is now.

A decade ago, survival of an infant less than 3 pounds or 30 weeks gestation was indeed rare, principally because the lungs of smaller infants, unaided, are too undeveloped and fragile to sustain life. Now infants with birth weights of about 1⅔ pounds routinely survive with the best of care, according to Dr. Richard Behrman, chief of neonatology at Rainbow Babies and Childrens Hospital in Cleveland and chairman of a national commission that studied viability in the mid-1970s

Sometimes even smaller babies make it, and the idea that most of them will be retarded or disabled is out-of-date, Behrman said. "Most . . . survive intact."

Even with the medical advances, though, some live-born infants are simply too small and undeveloped to have a realistic chance to survive. A survey last year of specialists in neonatal care found that 90 percent would not order life-support by machine for babies smaller than 1 pound 2 ounces or less than 24 weeks gestation. And on occasion, a newborn may manifest muscular twitches or gasping movements without ever "being alive" according to the usual legal test of drawing a breath that fills the lungs.

Still, it is no longer a miracle for an infant of 24 weeks development (which can be legally aborted) to be saved if born prematurely.

"It is frightening," said Dr. Roger K. Freeman, medical director of Women's Hospital at the Long Beach Memorial Medical Center in Long Beach, Calif. "Medical advances in the treatment of premature babies enable us to save younger fetuses than ever before. When a fetus survives an abortion, however, there may be a collision of tragic proportions between medicine and maternity. Medicine is now able to give the premature a chance that may be rejected by the mother."

In 1970, Freeman developed the fetal stress test, a widely used technique for monitoring the heart rate of unborn fetuses. Also, he and a colleague at Long Beach, Dr. Houchang D. Mondalou, have developed a drug, betamethzene, that matures premature lungs within days instead of weeks. The hospital claims a 90 percent success rate with infants weighing as little as 1 pound 11 ounces.

At the University of California at Irvine, work is used way on an "artifical placenta" that doctors there say could, within five years, push the threshold of viability back even further.

The life-saving techniques are not exclusive to top academic hospitals, either. Good neonatal care is now broadly available across the United States. In fact, the lively issue in medical circles these days is not whether tiny premature babies can be saved, but whether it is affordable. Bills for the full course of treatment of a two-pound infant typically run between $25,000 and $100,000. To some, that seems a lot to pay, especially in the case of an abortion baby that was not wanted in the first place.

The only way out of the dilemma, it would seem, would be for fewer women to seek late abortions. Though some optiomists argue that this is happening, there is evidence that it is not.

Studies show that women seeking abortions late in the second trimester are often young, poor and sexually ignorant. Many either fail to realize they are pregnant or delay telling their families out of fear at the reaction. The patients also include those who have had a change of circumstance or a change of heart after deciding initially to carry through a pregnancy; some of these women are disturbed.

As first-trimester abortion and sex education become more widely available, the optimists' argument goes, nearly all women who choose abortion will get an early abortion. But in fact a new class of older, well-educated, affluent women has now joined the hardship cases in seeking late abortions.

This is because a recently developed technique, amniocentesis, allows genetic screening of the unborn fetus for various hereditary diseases. Through this screening, a woman can learn whether the child she is carrying is free of such dreaded conditions as Downs syndrome (mongolism) or Tay-Sachs disease, a genetic disorder that is always fatal, early in childhood.

The test involves drawing off a sample of amniotic fluid, in which the fetus is immensed in the womb. This cannot be done until the 15th or 16th week. Test cultures for the various potential problems take several weeks to grow. Sometimes the result is inconclusive and the test must be repeated. The testing also reveals the unborn child's sex and can be used to detect minor genetic imperfections.

To many women, particularly those over 35, amniocentiesis seems a rational approach to minimizing the chances of bearing a defective child. A few, according to published reports, go a step further and make sure the baby is the sex they want before deciding to bear the child.

In any case, it is late in the second trimester—within weeks of the current threshold of viability—before the information becomes available on which a decision is made to abort or not abort. The squeeze will intensify as amniocentesis becomes more widely available and as smaller and smaller infants are able to survive.

The abortion live-birth dilemma has caught the attention of several experts on medical ethics, and they have proposed two possible solutions.

The simplest, advocated by Dr. Sissela Bok of the Harvard Medical School among others, is just to prohibit late abortions. Taking into account the possible errors in estimating gestational age, she argues, the cutoff should be set well before the earliest gestational age at which infants are surviving.

Using exactly this reasoning, several European counties—France and Sweden, for example—have made abortions readily available in the first three months of pregnancy but very difficult to get thereafter. The British, at the urging of Sir John Peel, an infuential physician-statesman, have considered in each of the last three years moving the cutoff date from 28 weeks to 20 weeks, but so far have not done so.

But in this country, the Supreme Court has applied a different logic in defining the abortion right, and the groups that won that right would not cheerfully accept a retreat now.

A second approach, advocated by Mrs. Bok and others, is to define the woman's abortion right as being only a right to terminate the pregnancy, not to have the fetus dead. Then if the fetus is born live, it is viewed as a person in its own right, entitled to care appropriate to its condition.

This "progressive" principle is encoded in the policies of many hospitals and the laws of some states, including New York and California. As the record shows, though, in the alarming event of an actual live birth, doctors on the scene may either observe the principle or ignore it.

And the concept even strikes some who do abortions as misguided idealism. "You have to have a feticidal dose" of saline solution, said Dr. Kerenyi of Mt. Sinai in New York. "It's almost a breach of contract not to. Otherwise, what are you going to do—hand her back a baby having done it questionable damage? I say, if you can't do it, don't do it."

The scenario Kerenyi describes did in fact happen, in March 1978 in Cleveland. A young woman entered Mt. Sinai Hospital there for an abortion. The baby was born live and, after several weeks of intensive care at Rainbow Babies and Childrens Hospital, the child went home—with its mother.

The circumstances were so extraordinary that medical personnel broke the code of confidentiality and discussed the case with friends. Spokeswomen for the two hospitals confirmed the sequence of events. Mother and child returned to Rainbow for checkup when the child was 14 months old, the spokeswoman there said, and both were doing fine.

The mother could not be reached for comment. But a source familiar with the case remembered one detail: "The doctors had a very hard time making her realize she had a child. She kept saying, 'But I had an abortion.'"

How Things Sometimes Go Wrong

Of the various ways to perform an abortion after the midpoint of pregnancy, there is only one that never, ever results in live births.

It is D&E (dilatation and evacuation), and not only is it foolproof, but many researchers consider it safer, cheaper and less unpleasant for the patient. However, it is particularly stressful to medical personnel. That is because D&E requires literally cutting the fetus from the womb and, then, reassembling the parts, or at least keeping them all in view, to assure that the abortion is complete.

Ten years ago it was considered reckless to do an abortion with cutting instruments after the first trimester of pregnancy. Now, improved instruments, more skilled practitioners and laminaria—bands of seaweed that expand when moist and are used to gently dilate the cervix, creating an opening through which to extract fetal parts—allow the technique to be used much later.

D&E is being hailed as extending the safe and easy techniques used for first-trimester abortions (cutting or vacuuming out the contents of the womb) well into the second three months of pregnancy. But there are dissenters. Dr. Bernard Nathanson, formerly a top New York City abortionist, now an anti-abortion author and lecturer, says that D&E "is a very dangerous technique in the hands of anyone less than highly skilled."

Besides, D&E puts all the emotional burden on the physicians. And there are other techniques that allow the doctor, as one physician put it, to "stick a needle in the [patient's] tummy," then leave the patient to deliver the fetus vaginally as in normal childbirth and nurses to assist and clean up.

These more common methods for abortion after the midpoint of pregnancy use the instillation of either saline solution or prostaglandin. In these procedures, some of the woman's nurturing amniotic fluid is drawn out of the womb by an injection through her belly and is replaced with the abortion-inducing drug. (The amount of fluid in the womb is kept relatively constant to make sure the womb does not rupture.)

The two instillation substances work in different ways. Saline solution poisons the fetus, probably though ingestion, though the process is not completely understood. Usually within six hours, the fetal heartbeat stops. At the same time, the saline induces labor, though supplemental doses of other labor-inducing drugs often are given to speed this effect.

Prostaglandin, on the other hand, is a distillate of the chemical substance that causes muscles to move. It is thought not to affect the fetus directly but instead is potent at inducing labor. Fetal death, if it does occur, is from prematurity and the trauma of passage through the birth canal.

Each substance also has an undesired side effect. Saline, an anti-coagulant that increases bleeding, can make minor bleeding problems more serious and in rare cases even cause death. Prostaglandin, because it causes muscles to contract indiscriminately, was found to cause vomiting and diarrhea in more than half the patients in early tests. Claims that it causes fewer major complications, which made it preferred to saline by many in the mid-1970s, have now been questioned. And the high incidence of live births (40 times more frequent than with saline, according to one study) also has lessened its popularity.

But saline is not foolproof either in preventing live births. Dr. Thomas F. Kerenyi of Mt. Sinai Hospital in New York, the best-known researcher on saline abortions, said most live births result from "errors in techniques"—either administering too small a dosage or getting some of it into the wrong part of the womb.

A wrong estimation of gestational age can cause either a saline or prostaglandin abortion to fail. A larger-than-expected fetus might survive the trauma of labor or might reject a dose of saline (or urea, a third instillation substance sometimes used).

And on the basis of physical examination alone, studies show, doctors miss the correct gestational age by two weeks in one case out of five, by four weeks in one case out of 100, and sometimes by more than that. Pregnancies can be dated more exactly by a sonogram, a test that produces an outline image of the fetus in the womb, but because of its cost (about $100) many doctors continue to rely on physical exams.

There is one other abortion technique, hysterotomy, but it is the least desirable of all from several points of view. Because it is invasive surgery (identical to a Caesarean section), it has a much higher rate of complication than do the installation techniques. Usually done only after attempts to abort with saline have failed, it has the highest incidence of all of live births.

As the infant is lifted from the womb, said one obstetrician, "he is only sleeping, like his mother. She is under anesthesia, and so is he. You want to know how they kill him? They put a towel over his face so he can't breathe. And by the time they get him to the lab, he is dead."

Over the years, the chief criterion in choosing between abortion methods has been safety for the patient. Advocates of D&E contend that bleeding, perforation of the uterus and infection all occur less frequently with D&E than with other methods. Dr. Willard Cates of the Center for Disease Control in Atlanta prefers D&E. Because it can be done—unlike instillation—in the early part of the second trimester, he has said, the need for as many as 80 percent of the very late abortions could be eliminated.

How very late are abortions performed?

His own clinic at Mt. Sinai, Dr. Kerenyi said, screens patients closely to make sure they are not past the legal 24-week limit. But in theory, he said, there is nothing to prevent successful saline abortions from being performed "virtually all the way to birth. At 30 weeks, say, you would just have to draw off and inject that much more of the solution."

Most practitioners who were interviewed say they stop doing D&E at 18 to 22 weeks. But again, there appears to be nothing to prevent the technique from being used much later.

"You can do it, you can do it," an abortionist, who would talk only if not quoted by name, said of D&Es late in pregnancy. "Some son-of-a-bitch misreads a sonogram and sends me a woman 26 weeks. I've done it. You've just got to take your time and be careful. And you're not going to end up with a live birth."

"I Stood By And Watched That Baby Die"

Nurses are the ones who bear the burden of handling the human-looking products of late abortions. And when an unintentional live birth occurs, they are the first to confront the waving of limbs and the gasping.

Reluctant to talk about their experiences, most of those interviewed for this article did not want their names to be published, and out of professional loyalty, they did not even want their hospitals to be named.

They spoke of being deeply troubled by what they have seen of late abortions in American hospitals.

Linda is a nurse in her late 50s in Southern California. Hurrying out of a patient's room one day to dispose of the aborted "tissue," as nurses were taught to think of it, she felt movement. Startled, she looked down, straight into the staring eyes of a live baby.

"It looked right at me," she recalled. "This baby had real big eyes. It looked at you like it was saying. 'Do something—do something.' Those haunting eyes. Oh God, I still remember them."

She rushed the 1½-pound infant to the nursing station. She took the heart rate—80 to 100 beats a minute. She timed the respirations—three to four breaths a minute. She called the doctor.

"I called him because the baby was breathing," Linda said. "It was pink. It had a heartbeat. The doctor told me the baby was not viable and to send it to the lab. I said, 'But it's breathing' and he said, 'It's non-viable, it won't be breathing long—send it to the lab.' "

She did not follow the order. Nor did she have resources at her command to provide any life-saving care. Two hours later the infant died, still at the nursing station, still without medical treatment. It died in a makeshift crib with one hot-water bottle for warmth and an open tube of oxygen blowing near its head.

The nursing supervisor, Linda said, had refused to let her put the baby in the nursery, where there was equipment to assist premature babies in distress. "She said to follow the doctor's orders and take it to the lab. I kept it with me at the station. We couldn't do an awful lot for it."

This happened eight years ago, in 1973, but Linda is still upset. "I stood by and watched that baby die without doing a thing," she said. "I have guilt feelings to this day. I feel the baby might have lived had it been properly cared for."

Jane, about 50, is the head floor nurse in an Ohio hospital. She and her fellow nurses successfully petitioned their hospital in 1978 to stop doing late abortions. Twice before that, she witnessed live births after abortions.

She recalls vividly the 16-year-old patient who phoned her mother after her abortion and and said in an agonized voice, "Ma, it's out—but Ma, it's alive."

That happened in 1975. Jane still speaks of it bitterly, her eyes flashing anger.

A year earlier Jane saw the second abortion live birth in her experience. "I was called by the patient's roommate," she recalled. "When I got there the baby's head was sticking out and its little tongue was wiggling. Everybody felt they couldn't do anything until they called the doctor. It was a little thing—it only lasted about 15 minutes. But it was alive, and we did nothing. And that was wrong."

It rankles, too, that she was routinely forced to handle dead fetuses, the size and shape of well-formed premature babies.

"Because of my position," she said, "I had to pick them up off the bed and put them in a bottle of formalin [a preservative fluid]. Sometimes you had to have a very large container. Our gynecologists seemed to have a very poor ability to estimate gestational age. Time and again they would say with a straight face, 'This woman is 20 weeks pregnant' when she was actually 26 weeks."

Norma Rojo, about 35, is an obstetrical nurse at Indio Community Hospital in Indio, Calif. She was present the night of May 3, 1980, when a 15-year-old patient delivered a live baby girl after a saline abortion.

"Get rid of it" the patient cried hysterically. "I'm sorry. Mama—get rid of it," she said, the baby alive, kicking and crying between her legs.

Two weeks earlier the girl had been in a traffic accident that killed four others and had sought the abortion out of fear that her baby might be damaged.

The fetus, which in tests had shown a normal heartbeat of 132 to 136 in the womb, appeared healthy at birth. "She was beautiful." said Mrs. Rojo. "She was pink. There were no physical deformities. She let out a little lusty cry. She lay in a basin put there to catch all the stuff. She was waving her arms and legs. You could tell she was making a big effort to live."

The nurses cut the umbilical cord, wrapped the infant in a blanket and took her to the intensive care nursery. She was put in an isolette (a life-support system) within minutes and was given oxygen.

Acting on their own, the nurses had the 1 pound 14 ounce baby transferred six hours later to Loma Linda University Medical Center, one of several hospitals in the Los Angeles area specializing in the care of very small premature infants. Four days later the baby was reported stable but had developed a complication causing hemorrhaging of the brain. Dr. David Deming of Loma Linda said then that its chances were only 50-50. He added, though, that the abortion had done little damage. "I would say there is probably no effect on her from the saline."

Eleven days after birth, the baby died. Family members indicated they were upset by the nurses' effort to save it.

"After this experience," Rojo said, "my friend [another nurse] and I are changed. We realize doctors aren't perfect. . . . I hope this is the last [abortion live birth] I ever see, but if there are any more, we will do the same thing."

The CHAIRMAN. Are there any other questions of these witnesses by any member of the committee?

[No response.]

ABORTION NOT MENTIONED IN CONSTITUTION

The CHAIRMAN. I want to say this on the subject of abortion. Abortion is not mentioned in the Constitution of the United States. This field was never delegated by the States to the Union at the time the Constitution was written or by any amendment since the adoption of the Constitution.

Therefore, I do not hesitate to say that in my judgment the Supreme Court had no jurisdiction in entering the field of abortion. In my opinion that field is reserved to the States under the Constitution, but they went into it anyway. They not only went into it, they have written a law on it, practically, as you have stated here today.

Now, however, the testimony of Judge O'Connor as I recollect it was that she stated how she voted on these matters back yonder, and then after that the question of abortion became, if you want to call it, a hotter question, a question more timely and it has received a lot more consideration.

She did not answer about how she would vote on that question because, if she had done that, then she would disqualify herself from voting as a member of the Supreme Court on that question, when it comes before it, if it does. She said she anticipated it would come before the Supreme Court.

Therefore, I wanted to just bring out that point, that I do not think she could be censured necessarily for not saying how she would vote as a member of the Supreme Court on abortion because she would disqualify herself from voting on that question if it does come before the Supreme Court again.

I want to thank you witnesses here today, Dr. Willke and Dr. Gerster both. You have made a very fine impression on the members of the committee here, I am sure, and we thank you for your appearance.

Dr. **Willke**. It has been a real honor, Senator. Thank you for the privilege.

Dr. **Gerster**. Thank you for the opportunity to say the things that we had to say.

[Material follows:]

Testimony of
Carolyn Gerster, M.D.
Before the
Senate Judiciary Committee
September 10, 1981

I would like to thank Sen. Strom Thurmond and the members of the Senate Judiciary Committee for the opportunity to testify at this confirmation hearing.

I am an Arizona physician and was the co-founder and first president of the Arizona Right to Life Committee in October of 1971. I have served as director from Arizona to the board of directors of the National Right to Life Committee since its formation in 1973 and am the immediate past president of the national organization. My current position is Vice President in charge of International Affairs.

I would like to comment on the Justice Department memorandum from Kenneth W. Starr, dated July 7, 1981, summarizing his July 6th telephone investigation of Judge Sandra D. O'Connor's voting record on family-related issues during the period that she served in the Arizona State Senate. The memo reads in part: "Judge O'Connor further indicated, in response to my questions, that she had never been a leader or outspoken advocate on behalf of either pro-life or abortion-rights organizations. She knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her."

I was not contacted by the Justice Department for verification. This statement has been understandably misunderstood by members of the legislature and media to imply that Judge O'Connor and I share similar beliefs on the abortion issue.

I have known Sandra Day O'Connor since 1972. She is a gracious and a gifted lady. Quite apart from our social contact, however, we were in an adversary position during 1973 and 1974 due to Senator O'Connor's position on abortion-related legislation while she served as Senate majority leader.

The Justice Department memorandum is misleading and incomplete regarding Senator O'Connor's voting record from 1970 through 1974.

All of her votes cast on abortion-related bills during this period have been consistently supportive of legalized abortion with the possible exception of S.B. 1333 which allows physicians, medical personnel, and hospitals the right to refuse to participate in abortion procedures on moral or religious grounds. The bill was actually more related to freedom of conscience than to abortion, per se. The memo neglects to point out that S.B. 1333 passed unanimously (30 to 0) in the Senate, supported by those on both sides of the abortion debate.

In 1970, H.B. 20 proposed to remove all restrictions from abortions done by licensed physicians without regard to indication or duration of pregnancy. This bill, predating the 1973 Supreme Court decision by three years, would, if enacted, have allowed abortion on request to term, a radical concept even when compared to the most permissive of existing state laws in New York.

The Justice Department memo states that, "There is no record of how Senator O'Connor voted, and she indicated that she has no recollection of how she voted."

An article by Howard E. Boyce, Jr., appearing in the Arizona Republic on April 30, 1970, records the vote of all nine members of the Senate Judiciary Committee. Sen. O'Connor is recorded as casting one of the six votes for the bill, as she did in the Senate Rules Committee where the bill later failed to pass (Arizona Republic, May 1, 1970).

There were no votes cast by Senator O'Connor in 1971, as the two proposed abortion bills, H.B. 51 and S.B. 123, were sent to the Senate Public Health and Welfare Committee where they failed to pass.

In 1972, no abortion-related legislation was introduced, as the legislative route was abandoned by abortion advocates in favor of the judiciary. (The Arizona abortion law was upheld as constitutional on appeal).

In 1973, Senator O'Connor co-sponsored the Family Planning Act (S.B. 1190) which, as originally worded, would have furnished "all medically acceptable family planning methods and information to anyone regardless of age," without parental consent. A state or county physician could refuse to provide "service" on "medical grounds."

The Justice Department memo states that, "The bill made no express mention of abortion and was not viewed by then Senator O'Connor as an abortion measure.... She recalls no controversy with respect to the bill and is unaware of any hearings on the proposed measure."

In 1973, abortion certainly was regarded by many as a "medically acceptable method of family planning" and was so regarded by several state senators as well as the Arizona Republic (see attached Senate Public Health and Welfare minutes and Arizona Republic editorial of March 5, 1973).

S.B. 1190 passed Public Health and Welfare Committee but was held up in Rules Committee. Contrary to the Justice Department memo, hearings were held and the bill certainly was regarded as controversial.

On May 9, 1974, Senator O'Connor was one of nine senators voting against S.B. 1245 after an amendment had been added in the House "prohibiting certain abortions at educational institutions under jurisdiction of the board of regents." Senator O'Connor's vote is explained in the memo as being "on the ground that the Arizona Constitution forbade enactment of legislation treating unrelated subject matters... Her reasons for so voting are nowhere stated on the record."

In the August 1981 "First Monday," the publication of the Republican National Committee, and in a August 3rd letter from the White House to Mrs. Marie Craven of Chicago, Illinois, S.B. 1245 was cited as the only example of Mrs. O'Connor's voting record on abortion-related subjects. The letter erroneously stated that the bill was "turned down" by the Senate because the amendment was unrelated. Actually, S.B. 1245 passed 20 to 9, with one member absent. The amendment was not ruled to be non-germaine.

The most important piece of pro-life legislation is totally omitted from Mr. Starr's memorandum.

In 1974, after a rally of over 10,000 Arizonans and the submission of 35,000 names of registered voters favoring the measure, House Memorial 2002 passed the Arizona House of Representatives by a 41 to 18 vote. The memorial would have petitioned the U.S. Congress to pass a Human Life Amendment to the Constitution restoring legal protection to the unborn child except where the mother's life was in jeopardy.

H.B. 2002 passed the Senate Judiciary by a 4 to 2 vote. Sandra O'Connor is reported in the April 23, 1974, Phoenix Gazette as voting against it even after amended to include rape and incest in addition to life of the mother.

On May 7, 1974, a Phoenix Gazette article quoted Sandra O'Connor as follows: "I'm working hard to see to it that no matter what the personal views of people are, the measure doesn't get held up in our caucus." On May 15, 1974, H.R. 2002 failed to pass the majority caucus by one vote. Sen. Trudy Camping, a member of the Caucus, has submitted a notarized statement that Sen. O'Connor voted against the memorial.

The President's personal assurance to me on January 17, 1980, at the Hilton Hotel in Rye, New York, was reiterated in the 1980 Republican platform, as "We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."

I realize that there are some members of the Senate who do not share our beliefs that abortion is the most basic of all civil rights.

There is, however, general agreement that misrepresentation, evasion, and distortion of fact do a disservice to the selection of a justice to the nation's highest court.

I have every confidence that this committee will make a full investigation of this deeply flawed and seriously misleading Justice Department memorandum.

Testimony of
John C. Willke, M. D.

September 10, 1981
Senate Judiciary Committee

I am here to speak for the National Right to Life Committee. Our organization is composed of the fifty state right-to-life organizations which contain almost 2000 active chapters and an estimated membership in the millions.

We are concerned.

We exist as a movement because of the 1973 Roe v. Wade decision of the U.S. Supreme Court. Just as the Dred Scott decision of 1857 was the civil rights outrage of that century, so we see Roe v. Wade as a similar blot upon our nation in this century. In Dred Scott, the Supreme Court ruled that an entire class of living humans were chattel. This decision denied Black Americans equal protection by law.

Let us flash back in time to the post-Civil War era, and ask a question. Suppose a nominee to the U.S. Supreme Court was being questioned and his qualifications examined. Suppose that person, as a legislator, had previously voted for the continuation of slavery, not once but twice. Suppose also that he had voted against a memorial resolution asking the Congress to pass a constitutional amendment to abolish slavery, again voting for this discrimination not once but twice.

Would it not be a proper question to inquire whether that nominee still held to his pro-slavery convictions?

We believe so. We also believe that if such earlier actions were not totally repudiated by that nominee, that nominee would be disqualified from sitting on the Supreme Court.

A century has passed. Another Supreme Court, by a similar 7-2 decision, ruled (in Roe v. Wade) that another entire class of living humans were to be reduced to the status of property of the "owner" (the mother). Further, the mother was given a newly created "right to privacy," a right that allowed her to destroy that property--her unborn child--if she wished.

Because of this ruling and because of the Court's interpretation of the word "health," we have seen the body count of unborn babies climb to its present level of 1½ million annually.

There are indeed some "single issues" which are so fundamental that they ought to be weighed very heavily in considering any lifetime appointment to the federal bench--among these, racial justice. In 1948 G. Harrold Carswell gave a speech in which he said, "I believe that segregation of the races is the proper and the only practical and correct way of life in our states." During Senate consideration of his nomination to the U.S. Supreme Court 22 years later, Judge Carswell completely repudiated this position. Yet this matter weighed heavily upon the minds of many senators, and quite properly so. Concern over Carswell's commitment to racial justice played an important role in the rejection of his nomination.

We believe that recognition of the right to life of unborn children is, likewise, a fundamental issue. Those who do not recognize this fundamental right should be considered disqualified for the federal bench.

A nominee sits before this distinguished body, which will decide whether she is qualified to sit upon the U. S. Supreme Court. There are serious questions to ask. Her record as a state legislator is disturbing.

In 1970, Mrs. Sandra O'Connor was a state senator in Arizona. Only one-third of the states had legalized abortion, most laws being highly restrictive. New York had just legalized abortion-on-demand until 24 weeks, and was to be the second last state to legalize abortion by statute. Thirty-three states were to vote on such proposed laws and to defeat them. The nation had been shocked by the radical New York law and had already read of babies surviving abortion attempts.

In this climate, Senator O'Connor voted for a bill that would have legalized abortion-on-demand in her state for the entire nine months of pregnancy. No statute remotely as radical had been seriously considered elsewhere.

This was not a casual vote on the floor during a busy legislative session. We can all understand how, in the push of a busy session, a lawmaker can at times vote without full knowledge of a bill's dimensions, and we can certainly understand how one might not always remember such a vote.

But Senator O'Connor was a member of the Judiciary Committee that had studied the bill. Hers was no casual action. Clearly, it was a deliberate vote cast with full awareness of the reach of that legislation. Furthermore, she voted for the bill a second time in a later caucus.

A few weeks ago, the nation was informed through the "Starr Memo" that Mrs. O'Connor did not remember her votes on this bill.

As events transpired, the Supreme Court in 1973 actually legalized abortion through the entire nine months of pregnancy. In 1974, the Arizona House of Representatives, by a wide margin, passed a memorialization resolution calling upon Congress to reverse that radical abortion ruling through a Constitutional Amendment.

Once again Senator O'Connor, as a member of that state's Judiciary Committee, had the issue placed before her. Once again, by voting against that resolution (even after it was amended to exclude cases of rape and incest), Mrs. O'Connor placed herself in favor of abortion, essentially on-demand, through the ninth month of pregnancy. Again, she repeated her pro-abortion vote in caucus.

But Mrs. O'Connor has more recently stated that she is "personally opposed" to abortion. I have never met an abortion clinic operator or an abortionist who was *not* "personally opposed." The simple fact is that such a statement often is totally meaningless as an indicator as to how such a person views abortion for others.

There is another important point. The Supreme Court's 1973 abortion decisions had no authentic basis in the Constitution. Rather, they constituted the most extreme examples of "judicial activism" by the Supreme Court which we have seen in this century--"an exercise in raw judicial power," as Justice Byron White said in his dissent to *Roe v. Wade*. Even many "pro-choice" legal scholars recognize that these decisions were without constitutional foundation.

Completely aside from the question of whether or not Mrs. O'Connor personally believes that abortion should be legal or not, it is essential that the Judiciary Committee determine how she views the constitutionality of the Supreme Court's abortion decisions. If O'Connor regards the 1973 abortion decisions as constitutional decisions, and as binding precedents, then she is not in fact a judicial "constructionist," and her nomination should be rejected for that reason alone.

We recognize the possibility that a person might state that she was "personally opposed," that she might favor permissive abortion laws, but at the same time could still view *Roe v. Wade* as seriously flawed, an unwarranted exercise of "raw judicial power," and an unconstitutional decision that must be reversed. If in fact such was the case, we would be pleased to reevaluate our position of opposition to her appointment.

In closing, I must say that the lady sitting next to me (Dr. Carolyn Gerster) is probably no more or less perfect than the rest of us. She undoubtedly has her faults. One fault that she does not have, however, and none of us who know her could even conceive of her having, is that of being "vindictive."

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national
RIGHT TO LIFE
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APPENDIX

1. Article from the Arizona Republic (April 30, 1970), reporting that Sen. Sandra O'Connor voted for HB 20 to legalize all abortions performed by a physician. (The bill later died in the Senate Rules Committee.)
2. Text of SB 1190, a 1973 bill to promote "family planning" which O'Connor co-sponsored.
3. Editorial opposing O'Connor's family planning bill (Arizona Republic, March 5, 1973), warning that the bill appeared to have no purpose "unless energetic state promotion of abortion is the eventual goal."
4. Page from Senate committee minutes, supporting contention that SB 1190 would have included abortion.
5. Arizona Senate Journal pages showing votes pro and con on 1974 measure to prohibit abortions at the University of Arizona hospital except to save the life of the mother (SB 1245).
6. Text of the restriction attached to SB 1245.
7. Text of 1974 House Memorial 2002, calling for Congress to enact a Human Life Amendment.
8. Phoenix Gazette article (April 23, 1974) reporting O'Connor's vote against HM 2002 in the Senate Judiciary Committee; Phoenix Gazette article (May 7, 1974) in which O'Connor claims to oppose blocking HM 2002 in the GOP Senate Caucus; and Phoenix Gazette article (May 15, 1974)charging the GOP Senate Caucus with blocking HM 2002.
9. Notarized statement by former Arizona State Senator Trudy Camping, stating that O'Connor voted against HM 2002 in Caucus.
10. Justice Department memo written on July 7 by Kenneth Starr.

[From the Arizona Republic, Apr. 30, 1970]

Abortion Bill Clears Senate Judiciary Panel

(By Howard E. Boice, Jr.)

A long-dormant bill to legalize abortions cleared the Senate Judiciary Committee over the objections of its chairman yesterday and moved to Rules Committee, where it could be voted on today.

The bill, which passed the House Feb. 26, would remove all legal sanctions against abortions performed by licensed physicians.

It was the first time the measure appeared on the Judiciary Committee agenda. It passed by a 6 to 3 vote.

Chairman John Conlan, R-Maricopa, and Sens. Dan Halacy, R-Maricopa, and James F. McNulty, D-Cochise, voted against the bill.

Sens. Chris Johnson, R-Maricopa, Harold C. Giss, D-Yuma, Michael Farren, R-Maricopa, David B. Kret, R-Maricopa, James F. Holley, R-Maricopa, and Sandra O'Connor, R-Maricopa, voted in favor of the measure.

The Judiciary Committee also approved bills to establish a division of children's services in the State Welfare Department, to permit courts to remove a felony conviction from the record of a defendant believed to have been rehabilitated, to overhaul initiative and referendum procedures and to stop the prosecution of persons now subject to criminal charges for acts of self-defense.

The Senate, meanwhile, passed and sent to the House bills to permit creation of metropolitan transit authorities with the power to levy taxes to cover operating losses and to issue revenue bonds up to $2 million for capital outlay, and to establish a nine-member commission on judicial qualifications with the power to recommend removal of incompetent judges.

Also, the Senate Appropriations Committee reversed an earlier action and voted 6 to 4 for $2.75 million to build a maximum security facility at the Arizona State Hospital. The committee had killed a similar bill earlier this session.

The Appropriations Committee also approved a bill to provide state aid for public school kindergartens.

Several members of the Senate, both Republican and Democrat made floor speeches yesterday condemning what they termed political motivation behind recent attacks on the welfare department by Rep. Frank Kelley, R-Maricopa, and Rep. Burton S. Barr, R-Maricopa.

Sen. E. B. Thode, D-Pinal, contended that Kelley had used a directive by an interim committee of which has was chairman to spend $20,000 for a welfare department "study" that he released before having committee approval.

She termed the study and subsequent statements by Kelley and Barr about the report a "witch hunt" directed at Welfare Commissioner John O. Graham.

Sen. Boyd Tenney, R-Yavapai, said Kelley was using the report, prepared by Prof. Edmund Mech of Arizona State University, as a "vendetta."

In another matter, Barr and House Speaker John Haugh, R-Pima, were accused by Sen Dan Halacy, R-Maricopa, of engineering the "execution" in the House of a bill that would have lowered the presumptive level of drunkenness from .15 per cent blood alcohol to .10.

". . . Speaker John Haugh decreed the fate of Senate Bill 147," Halacy stated. "and majority leader Burt Barr was the Lord High Executioner."

"It is clear to me, and to many who are more expert in these matters than I," Halacy added, "that .10 per cent is a needed change. Why did the House leadership kill it?"

S.B. 1190—State of Arizona, 31st Legislature, 1st Regular Session—Senate

Introduced by Senators Holsclaw, Alexander, Baldwin, Corbet, O'Connor, Giss, Felix, Ulm, Awalt, Hardt.

An act relating to public health; providing family planning methods, and amending title 36, chapter 6, Arizona Revised Statutes, by adding article 4.1.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Legislative declaration: The legislature finds and declares that it is desirable for the health, welfare and economy of this state that persons desiring and needing family planning information and methods shall have access thereto without inhibitions or restrictions.

Sec. 2. Title 36, chapter 6, Arizona Revised Statutes, is amended by adding article 4.1, sections 36-681 through 36-687, to read:

ARTICLE 4.1. FAMILY PLANNING

36-681. Definitions

In this article, unless the context otherwise requires:

1. "Commissioner" means the Commissioner of the Department of Public Health.
2. "Department" means the State Department of Health.
3. "Physician" means a doctor of medicine or doctor of osteopathy licensed to practice in this State.

36-682. Policy; authority and prohibitions

A. All medically acceptable family planning methods and information shall be readily and practicably available to any person in this State who requests such service or information, regardless of sex, race, age, income, number of children, martial status, citizenship or motive.

B. A hospital, clinic, medical center, pharmacy, agency, institution or any unit of local government shall not have any policy which interferes with either the physician-patient relationship or any physician or patient desiring to use medically acceptable family planning procedures, supplies or information.

C. Dissemination of medically acceptable family planning information in State and county health departments, State and local welfare offices and at other agencies and instrumentalities of the State is consistent with public policy.

D. This article does not prohibit a physician from refusing to provide family planning methods or information for medical reasons.

E. A private institution or physician or any agent or employee of such institution or physician may refuse to provide family planning methods and information and no such institution, employee, agent or physician shall be held liable for such refusal.

36-683. Furnishing services to minor

A physician may furnish family planning services to a minor who in the judgment of the physician is in special need of and requests such services. The consent of the parent, parents or legal guardian of the minor is not necessary to authorize such family planning service.

36-684. Performing surgery

A physician may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing.

36-685. Duties, powers of department

A. In order that family planning services shall be available to persons, the department may receive and disburse such funds as may become available to it for family planning programs.

B. For the purpose of providing services pursuant to subsection A, the department may contract with physicians or organizations, public or private, engaged in providing family planning methods and information.

36-686. Acceptance of funds

The department may accept public or private funds, grants or donations in aid of any program authorized by this article.

36-687. Rules, regulations

The commissioner may adopt and issue rules and regulations necessary to enable the department to implement the provisions of this article.

[From the Arizona Republic, Mar. 5, 1973]

EDITORIAL: "DANGERS OF VAGUE BILL"

The family planning bill being considered by the Arizona Senate, S.B. 1190, is inexcusably vague, precisely the sort of measure to lead to agonies of judicial interpretation.

At the Senate Public Health and Welfare Committee's meeting scheduled today, members should give closer attention to a bill they've already revised slightly because of uncertain language.

The bill says that "all medically acceptable family planning methods and information" should be furnished to anyone in Arizona seeking them, "regardless of sex, race, income, number of children, marital status, citizenship or motive."

Regardless of motive? Is a prostitute to be guaranteed state contraceptives for her job?

Regardless of citizenship? Is a tourist state such as Arizona to dole out contraceptives to every visitor from near and far who demands them?

Regardless of marital status? Obviously, the new morality.

The original wording also said regardless of age, but some senators apparently realized this could mean the state must approve the facilitation of statutory rape.

In addition, the bill says that a physician can refuse to provide family planning methods or information "for medical reasons." Medical, but not moral.

While the legislature may feel itself inadequate to decide questions of family planning morality, it should recognize that physicians don't uniformly approve encouraging sexual relations under every circumstance, even if medically acceptable.

The bill does add that private institutions, physicians, and their employees shouldn't be held liable for refusing to supply the information and methods, although these are treated as every citizen's right. But if they are automatically a right, could they be legally withheld?

Late last year in Montana, a judge ordered a Catholic hospital to sterilize a woman because she considered it her right, even though the hospital and staff objected.

Perhaps the most important question, however, has been raised by Sen. John Roeder who, as even he describes himself, is not the most antiabortion member of the legislature.

He fears the vagueness of the bill's reference to "all medically acceptable family planning methods" could positively put the state into the business of encouraging abortions.

Only a decade ago, family planning was commonly accepted as referring to contraception, but contraception was sharply differentiated from abortion even by family planning's faithful boosters.

But now the abortion front has developed dishonest terminology in which abortion isn't even described as "interruption of pregnancy" but "post-conceptive family planning."

Planned Parenthood used to be distressed by people who believed contraception was murder, just like abortion. Yet now PP often blurs the distinction even more terribly.

Rather than inhibiting abortion, as some unwise supporters of the bill contend, it might make it more widespread.

Why, indeed, is this bill proposed? The state certainly has no policy of discouraging contraception. The bill appears gratuitous—unless energetic state promotion of abortion is the eventual goal.

MINUTES FROM MARCH 5, 1973 HEARING

Senator Runyan moved to insert the words "required by a licensed practical nurse in this state." On line 2, page 5, after the word "qualifications" and then strike the remainder of the section; the motion carried. He then moved to insert the words "for a license" on line 10, after the word "applicant" and on line 11 after the words "meets" to strike the remainder of the section and insert "the qualifications for licensing specified in Section 32-1637."; the motion carried.

Senator Runyan then moved the bill be returned to the Senate with a do pass recommendation as amended, the motion carried. Senator Roeder voted no and requested a minority report.

SB 1190—FAMILY PLANNING

This bill had been discussed at the previous meeting and some amendments had been made. Senator Runyan asked what the status of the bill was at this point. The chairman stated that copies of the amendments considered at the last meeting were ready for each member but that they would have to be considered again. Senator Runyan moved the bill for purpose of amendments. He then moved to strike lines 2 through 6 on page 1.; on page 2, line 2, strike "AGE" and on line 9, strike "IN" and insert "BY"; on line 10, after "OFFICES" insert a period and strike remainder of line and strike line 11.

Senator Roeder stated that the editorial appearing on the morning Republic (2/5/73) stated far better than he could that the bill before the Committee was useless; that since the Supreme Court had ruled on Abortion it was not a legislative problem but a legal problem and that presently abortion was a perfectly proper form of family planning.

Senator Corbet stated he hoped the members were not equating abortion with birth control as that was not his understanding of the bill. He did not favor abortion but felt this bill was an attempt to change some of the practices of the past whereby birth control information was not available. He further stated that his vote killed the abortion bill in Committee two years ago and he still feels the same way but sees a difference in the Supreme Court Ruling and this bill before the Committee. He stated the Legislature should be one of action and not reaction. He also stated that while he did not wish to court trouble with the Arizona Republic he did not agree with their article in the morning paper.

Senator Alexander stated that the Federal Government (Health Education & Welfare) has already issued guide lines for block grants and that family planning plays a big part and this should be considered as Arizona will be affected eventually. He stated that he felt the time has come when the Committee should adopt a statewide program providing for limited family planning. He stated he does not advocate the State providing abortions.

Senator Runyan moved an amendment to his original amendment on page 2, line 2, strike "OR MOTIVE". A vote was taken on the entire amendment and carried.

Senator Runyan moved to amend the bill on page 2, line 19, after "SERVICES" insert ", EXCLUSIVE OF SURGICAL PROCEDURES EXCEPT WHERE REQUIRED FOR DIAGNOSIS". This motion carried with Senators Camping and Roeder voting no.

Senator Runyan moved to amend on line 21 after "PARENT" by inserting the words "IS OBTAINED" and striking the remainder of the paragraph.

Mr. William Carter of Maricopa County Health Dept. and Mr. Joe Davis of Phoenix Planned Parenthood both spoke against this amendment.

Senator Roeder stated the amendment would do away with the basis of the bill and that is why he felt the Committee should put the bill aside and re-do it in order to have something the people of Arizona could live with.

Dr. William Russell stated it was the minors they were trying to help and the need was now.

Senator Runyan stated he was aware of the problem but that he had a moral problem in that he felt the bill was one more step in breaking down the family unit and he could not see taking control of minors away from the parents.

Senator Corbet stated he felt very strongly about the family as a unit but that something had to be done. Dr. Russell stated that the minors most doctors were seeing had already strayed and that it was not the family that got pregnant. Senator Camping stated that maybe these youngsters had never heard that it was wrong.

Senator Guteirrez stated that the amendments being offered in the bill were not going to change the family situation, those parents with control of their children would still have control. Dr. William Moore said the Committee might want to substitute the word "contraceptive" for family planning. Father M. Calegari called attention to two contraceptives already on the market.

Senator Alexander offered a substitute motion to Senator Runyan's, to insert the words "DESIRABLE WHERE POSSIBLE BUT" on line 22, after the word "IS.", this motion carried with Senator Runyan and Camping voting no.

JOURNAL OF THE SENATE, THURSDAY, MAY 9, 1974, ONE HUNDRED SIXTEENTH DAY

Ayes 29: Alexander, Baldwin, Camping, Corbet, Ellsworth, Felix, Gabaldon, Gutierrez, Hardt, Holsclaw, Hubbard, Koory, Kret, Lena, Mack, McNulty, O'Connor, Osborn, Roeder, Rottas, Runyan, Stinson, Strother, Strump, Swink, Tenney, Turley, Ulm, President Jacquin.

Not voting 1: Pena.

House Bill 2079 was signed in open session with the emergency and returned to the House.

HOUSE BILL 2116

An Act relating to education; defining the rights of parents and guardians of school children to examine pupil records; providing for certain filing of transcript of change of boundaries of new school districts, and amending title 15, Arizona Revised Statutes, by adding chapter 1.1.

Ayes 26: Baldwin, Camping, Corbet, Ellsworth, Felix, Gabaldon, Gutierrez, Hardt, Holsclaw, Hubbard, Koory, Lena, Mack, O'Connor, Osborn, Roeder, Rottas, Runyan, Stinson, Strother, Stump, Swink, Tenney, Turley, President Jacquin.

Noes 3: Alexander, McNulty, Ulm.

Not voting 1: Pena.

House Bill 2116 was signed in open session with the emergency and returned to the House.

SENATE BILL 1245

An Act relating to education; prescribing certain additional powers and responsibilities of the board of regents relating to educational institutions; authorizing the Arizona Board of regents to remodel the stadium at the University of Arizona and acquire, construct, equip, furnish and maintain an addition thereto and enter into projects for other purposes for which revenue bonds may be issued by the board of regents for any of the universities, and for those purposes to accept gifts, to borrow money and issue bonds, to refund bonds heretofore and hereafter issued for such educational institutions, to provide for the payment and security of all bonds issued hereunder, and to perform necessary or convenient acts in connection with such projects; superseding inconsistent provisions of all other laws; prohibiting certain abortions at educational institutions under jurisdiction of board of regents; amending title 15, chapter 7, article 2, Arizona Revised Statutes, by adding section 15-730, and declaring an emergency.

Ayes 20: Camping, Corbet, Ellsworth, Gabaldon, Hardt, Hubbard, Koory, Lena, Mack, McNulty, Osborn, Rottas, Runyan, Stinson, Strother, Swink, Tenney, Turley, Ulm, President Jacquin.

Noes 9: Alexander, Baldwin, Felix, Gutierrez, Holsclaw, Kret, O'Connor, Roeder, Stump.

Not voting 1: Pena.

Senate Bill 1245 was signed in open session with the emergency and transmitted to the Governor.

RECESS

At 5:31 a.m., the Senate stood at recess subject to the sound of the gavel.

The President called the Senate to order at 9:10 a.m.

MESSAGES FROM THE HOUSE

Messages from Chief Clerk K. E. Betty West advised that on May 10, 1974:

The House acceded to the request of the Senate in the matter of disagreement on Senate Bill 1283, natural resources coordinator, and appointed Members T. Goodwin, Kelley and Dewberry as a free conference committee.

The House concurred in Senate amendments to the following bills and passed on final reading as amended by the Senate:

impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part of this act in any one or more instances shall not be taken to affect or prejudice its applicability or validity in any other instance.

Sec. 14. Supplemental nature of act; construction and purpose

The powers conferred by this act shall be in addition to and supplemental to the powers conferred by any other law, general or special, and bonds may be issued under this act notwithstanding the provisions of any other such law and without regard to the procedure required by any other such laws. Insofar as the provisions of this act are inconsistent with the provisions of any other law, general or special, the provisions of this act shall be controlling.

Sec. 15. Title 15, chapter 7, article 2, Arizona Revised Statutes, is amended by adding section 16-730, to read:

15-730. Abortion at educational facility prohibited: exception

No abortion shall be performed at any facility under the jurisdiction of the board of regents unless such abortion is necessary to save the life of the woman having the abortion

Sec. 16. Emergency

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

H.C.M. 2002—STATE OF ARIZONA, 31ST LEGISLATURE, 2ND REGULAR SESSION—HOUSE

Introduced by Representatives Skelly of District 25; Brown of District 3; Cuerrero of District 4; Bradford of District 5; Alley of District 6; Pacheco of District 7; Fenn, Sawyer of District 8; Dewberry, Richey of District 9; Cajero of District 10; Carrillo of District 11; Carlson, Kincaid of District 13; H. Everett, Ratliff of District 15; Lindeman of District 17; West of District 19; Adams, McCune of District 20; Hamilton, Pena of District 22; Abril, Thompson of District 23; Corpstein of District 24; Carvalho, Hungerford of District 28; Cooper, Taylor of District 29; Junasek of District 30; co-sponsored by Senators Tenney of District 1; Gabaldon of District 2; Hubbard of District 3; Hardt of District 4; Swink of District 7; Ulm of District 9; Lena of District 10; Felix of District 11; Strother of District 16; Koory of District 17; Stinson of District 20; Pena of District 22; Camping of District 25; Ellsworth of District 29; Turley of District 30

A concurrent Memorial urging an amendment to the Constitution of the United States establishing that human life with legal personality begins at the time of conception and that all constitutional rights, including due process of law, apply to the unborn in the same manner and to the same extent as to all other citizens of the United States.

To the Congress of the United States of America:

Your memorialist respectfully represents:

Whereas, respect for human life has been a hallmark of civilized society for millennia; and

Whereas, a legal threat to the right to life of any individual member of a society imperils the right to life of every other member of that society; and

Whereas, respect for and protection of unborn human life has been traditional with the medical profession since long before the beginning of the Christian era regardless of prevailing political, religious or social ideologies; and

Whereas, the moment of birth represents merely an identifiable point along the course of human development and not the beginning of human life; and

Whereas, the United States Supreme Court has withdrawn all legal protection from an entire class of human beings, namely, the unborn.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the

Senate concurring, prays:

1. That the Congress of the United States take appropriate action to amend the Constitution of the United States establishing that with respect to the right to life, the word "person" in the fifth and fourteenth amendments to our federal constitution applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency, except in an emergency where a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

[From Phoenix Gazette, Apr. 23, 1974]

MEMORIAL ADVANCED BY PANEL

The Senate Judiciary Committee reported out a House-approved Right to Life Memorial after hearing comments from both sides.

The final vote was 4 to 2 with Republican Sens. Sandra O'Connor of Paradise Valley and John Roeder of Scottsdale voting against the memorial. Roeder told the committee his response by Phone calls and written message ran 175 to 72 against the memorial.

Sen. Hal Runyan, R-Litchfield Park, added an amendment which would permit abortions where rape, incest or other criminal action was responsible for a pregnancy.

The memorial calls on Congress to extend constitutional propositions to unborn babies by prohibiting abortions. An exception also would be made where the mother's life was imperiled.

[From the Phoenix Gazette, May 7, 1974]

EXCERPTS FROM A LENGTHY ARTICLE

Mrs. Meyer's interview occurred at a time during which Arizona House Memorial 2002, which urges the U.S. Congress to pass an amendment to the U.S. Constitution giving the fetus all constitutional rights including the right to life from the moment of conception, is under debate in the Senate majority caucus.

Sen. Sandra O'Connor (R-Paradise Valley), Senate Majority Leader, is hopeful that the bill will go to the floor before the end of this legislative session. "I'm working hard to see to it that no matter what the personal views of people are, the measure doesn't get held up in our caucus."

Note: Attached is an affidavit signed by former Arizona State Senator Trudy Camping, stating that O'Connor voted against the memorial in caucus.

[From the Phoenix Gazette, May 15, 1974]

PRO-LIFE HEAD RAPS SENATE GOP

The president of Arizona Youth for Life has blamed the GOP Senate caucus for the failure of a legislative memorial against abortion to be passed.

Margaret Saunders of Scottsdale, head of the 400-member student organization formed recently, said, "No other measure up for the state legislature's consideration this session had such an overwhelming demonstration of citizen support."

She said that more than 10,000 persons attended a prolife rally at the State Capitol in January and 35,000 persons signed petitions supporting the memorial introduced in the House, which approved the measure 41-43 in March.

"Thus the very heavy responsibility for blocking this measure to death rests squarely with the Senate GOP caucus," which did not schedule the proposal onto the Senate floor for action. Miss Saunders said.

She said the group will "increase our determination to electorally remove from office that insensitive group who blockaded the efforts of so many other conscientious legislators of both parties."

PHOENIX, ARIZONA, *July 23, 1981.*

To Whom It May Concern:

While serving in the Arizona State Senate from 1971-1974, I was a member of the Judiciary Committee and a member of the Majority Caucus.

On April 23, 1974, HCM 2002—extending protection to the unborn, was passed out of Judiciary Committee. It was amended to allow for incest and rape.

After that it was considered in the Majority Caucus, possibly on May 1st, but did not receive the necessary votes for further consideration.

In both the Committee and the Caucus, Sen. O'Connor voted no—the bill was killed.

MRS. TRUDY CAMPING,
Former State Senator.

The CHAIRMAN. Our next witness is Dr. Carl McIntire, representing the International Council of Christian Churches. Dr. McIntire, come around.

Dr. McIntire, if you will speak for 5 minutes and then be subject to questions, the blue light means you are on; the yellow, there is 1 minute left; and the red, your time is up.

Will you stand and be sworn, please?

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. MCINTIRE. So help me God.

The CHAIRMAN. You may proceed, Dr. McIntire.

TESTIMONY OF DR. CARL McINTIRE, PRESIDENT, INTERNATIONAL COUNCIL OF CHRISTIAN CHURCHES

Dr. MCINTIRE. Mr. Chairman, Members of the U.S. Senate, my name is Carl McIntire. I live in Collingswood, N.J. I am pastor of the Bible Presbyterian Church there. I appear in my capacity as president of the International Council of Christian Churches. This is an agency set up by fundamental churches over the world, has a membership of 334 Protestant denominations in 86 states.

First, let me identify myself fully with the testimony you have just heard from Dr. Willke and Dr. Gerster. I am here, however, in connection with the matters of liberty as they pertain to our churches in this country. The first amendment guarantees the free exercise of religion, and our Bible Churches and our fundamental churches and pastors have suffered incalculable loss at the hands of the U.S. Supreme Court, which not only refuses to hear our cases but is responsible for abridging our freedom of religion.

It had been the hope of many Christians that President Reagan would give us a new beginning on the Supreme Court, too. Judge O'Connor has her position stated in William & Mary Law Review; she has verified it here. We cannot accept it and we cannot accept her.

First, I think we must recognize that there has been and is a religious upheaval in this country, in which the free exercise of religion is involved. Churches and people are separating from the major denominations, leaving the National Council of Churches and the World Council of Churches. When this is done, the rights of these people are then denied by the courts, in particular the Supreme Court.

This covers the whole realm or range of religious activities: Bible conferences, FCC regulations, IRS legislation, Justice Department decisions, civil rights taking preference over religious rights, mailing permits for religious papers, the grantings of visas, chaplains in the armed services, recognition of accrediting agencies, and the restriction of international congresses and general bureaucratic harassment. There is hardly a realm of religious activity where these new and separated religious bodies are not suffering and being denied their free exercise of religion.

Justice Connor made her position clear in the Law Review, and she has accepted an expounds the position of the Burger Court on abstention, that the Federal court should abstain from intervening in these State courts as they handle these constitutional matters.

Senator, I speak from bitter and costly experience, in case after case and constant court litigation for the past 16 years. After my church broke away from the United Presbyterian Church because of its new, modernistic doctrines and apostasy, we started a Bible conference in Cape May, N.J., called the Christian Admiral. The city of Cape May refused to give tax exemption to this property. The State law provided for exemption under the free exercise of religion.

The litigation consumed 6 years and cost more than the taxes would have cost. The highest Tax Court, however, gave full tax exemption to the Bible Conference. When the appeal was taken up to the State superior court where the State political pressures abound, it was reversed. Finally, when the case reached the Supreme Court of the United States, it refused to look at it.

Though the city gave tax exemption to a bingo hall run by the Roman Catholic Church in the center of town, our Bible Conference pays taxes on the hall where daily and Sunday religious services are conducted. There is now no appeal. Judge O'Connor's view of State court decisions being accepted, prevailed. This is the only Bible Conference in the State that pays taxes, but we are separated Presbyterians and in a great deal of trouble.

Senator, I have sat here during these 3 days and listened to this testimony. I have not heard of a single Senator asking any questions in this whole, broad area where our fundamental churches are having so much trouble with the courts. You, Senator, were the only one that asked a question about the free exercise of religion; you brought up the question of prayer, but you did not go into the question of prayer and Bible reading.

Senator, I have sat here with frustration. I have heard these Senators say that if something did come up, it might change their mind. Here we are now, I guess there is only one Senator left—that is you—and I brought up this whole area that has not even been looked into. Nothing has been said whatsoever about Judge O'Connor's position in regard to this resolution or this Memorial 2003 back there in April of 1973, in which she succeeded in blocking a memorial to the President and to the Congress asking for full first amendment rights to be given to broadcasters.

We would like to have her questioned on that matter because, as a result of that, that is the issue, that is the case where we lost our radio station WXUR. We did not have our full first amendment rights.

Senator, I raise this question of radio broadcasters, 8,000 stations in this country are involved. They are fearful. You cannot get into controversial issues in these questions because of the Supreme Court of the United States. When we finally got up there, Senator, they would not hear us, and we have suffered incalculably.

There is the question here of church properties, a 5 to 4 decision back there in September 1979. Who gets the properties of these churches that are withdrawing from the National Council of Churches. It is a broad issue all over this country.

Then we have the question here, Senator, of Shelton College. We have been 2 years of litigation with the State court taking the position of Judge O'Connor and the Federal Courts intervening and saving the college's life from being closed down. That whole thing has involved already 2 years of litigation, 200,000 dollars' worth of cost to the college. The issue is coming right up, there is an appeal before the Supreme Court right now simply on the jurisdiction question, and when it gets there it is Judge O'Connor's position as she stated here in this Law Review article from William & Mary, the same identical thing that she is in favor of, now she is going to be asked to make a decision on.

Senator, may I tell you, I have listened here and I saw these Senators come and say, "If something developed, it might change our mind." I am talking only to you, Senator. I want to say I object. A matter of such weight to the churches, a matter of such great concern to our liberty where we are suffering should be heard by this entire committee.

In fact, I would like to request that Judge O'Connor be brought back and answer questions concerning this overture that she opposed. She was the one that led in defeating it in Arizona, that the radio stations get their full first amendment rights. She was not for it. It involves our preaching. It involves our Bible Conference. It involves these things.

We come down to the end of the road, sir, I think this thing has been stacked. We have had quite a situation here. The President said, "Don't talk about it. Wait until we get to the hearing, and if something comes up at the hearing then you can judge this thing," but, sir, I have been here all this time and no one except you has touched this broad field of religious rights, the first amendment rights. Our separated churches, our independent churches are suffering. It goes into this question of our schools and whether we can get a license or teach.

Senator, I want to protest it. I want to protest coming down to the end of this hearing and only having you to talk to. I sat here and listened at every Senator here on the bench, I listened to them, and a majority have already said they are going to vote for her, so how in the world could we even change their minds at the present time with a 5-minute speech.

Thank you.

The CHAIRMAN. Dr. McIntire, you mentioned a memorial considered in the Arizona State Legislature which called for the President and Congress to give full first amendment rights to broadcasters in programing. Is there in your mind a distinction between the scope of first amendment rights guaranteed to the licensee of publicly owned airways and the first amendment rights, for example, of a newspaper publisher?

Dr. MCINTIRE. There should be none, sir, absolutely none. The first amendment is not restricted. One of the good Senators here said yesterday there was no difference now between—that TV had become news, and he mentioned the term "the press." I think that the restraints that have been placed there by the FCC should be removed and that the entire radio world should have the same identical freedom as the press, and be subject to the same restraints of law such as slander and libel and things of that sort.

If we had that, I could talk, sir. I have lost 400 radio stations from my broadcast because of what the Federal Communications Commission did in killing WXUR. When we went to the U.S. Supreme Court, they would not hear it. Senator, you yourself made a statement on the floor of the Senate saying that we had lost our first amendment rights, and Sam Ervin made a 6,000-word speech on the Senate floor saying that it should not have been done.

It has put fear, and it has put anxiety, and radio station owners will not permit controversial or issue problems to be dealt with for fear of complaints that are carried to the FCC. The expense is great, and when they get up there, of course, they could lose their license. It is the pressure that is brought, and this pressure, Senator, has been brought by the religious groups.

It was the United Church of Christ representing the National Council of Churches that went after radio station WXUR in Philadelphia, which Faith Theological Seminary owned, of which I am the pastor. After 8 years of litigation, we got here to the U.S. circuit court here in Washington, and Judge Bazelon was the chairman. The only thing left at that time after all those hearings was the question of the programing, before the station ever went on the air, the original application. It was alleged that it did not record the full intentions of the station, and therefore it was imperfect.

Senator, Judge Bazelon looked at that. He said the FCC has no right to require in its license application the knowledge of what kind of programing they are going to have. He said the station could live.

The CHAIRMAN. I recall when you lost your station I thought it was unjust. I think you were really denied your first amendment rights when that happened.

Dr. MCINTIRE. Senator, David Bazelon made a beautiful opinion in which he said that is what happened, but here we come to Judge O'Connor. She sat here and there were two things she said, both of which are in the general area which have afflicted us. Now she would not give any specifics but the general statements she made do apply to these practice incidents that we have suffered on.

For instance, she said that in the Supreme Court's hearing of constitutional questions, if there were other issues involved in the case by which the case could be settled, they were handled and the question of the Constitution was left not decided. Now she made a statement to that effect. Well, that is exactly what happened in the *WXUR* case.

Bazelon said the first amendment was there. These two judges, Wright and Tamm, said, "Well, there is this other question of the application. There is fraud there. We will say that it should not be continued." We went to the Supreme Court and, of course, they would not even hear it.

Our view, Senator, is that when you get to the first amendment rights of religion, that is primary. The greatest liberty we have is the liberty to serve God. The whole Constitution is designed to the end that we will be able to be free to serve God. Our view is that when cases come into the court procedures, they should have precedence, and if there is a question of a first amendment right of a religious minority coming before the Supreme Court, that should take precedence over any lesser questions that are there. Our religious rights must be first. They are not that at the present time, and her statement places her in the Court on the same level as we have been operating. Senator, we wanted a new beginning in the Court, and we do not have it in this.

The CHAIRMAN. Well, I am not too sure about that.

Now, Dr. McIntire, you have cited in your prepared testimony and here today you have cited several shocking examples of the use of the taxing power to pressure and coerce churches and church-sponsored schools. What action would you recommend that Congress take in curbing governmental interference with the free exercise of religion, and what action do you feel the Supreme Court ought to take in insuring that litigants seeking protection of the first amendment are not arbitrarily shut out?

Dr. MCINTIRE. Well, Senator, the Supreme Court is our guardian. The Supreme Court should make it very, very clear in these cases that the tiniest religious minority will be heard. We cannot be heard. We cannot get in the front door. We have never been able to get in that Supreme Court. That is No. 1.

The other aspect of this is, I feel that the Congress of the United States, every man takes a vow to support the Constitution. They should look into these matters and correct the possibility of such abuse in the Federal Communications Commission, in the Internal

Revenue, where they are going after religious schools right this very minute. We have the *Bob Jones* case that is in the courts right now.

There are a good many cases and it is in that area, I believe, that the Congress of the United States should protect these constitutional rights of the religious minorities. Senator, we are shut out simply on the basis of money. It has cost us $200,000 thus far. Talk about the poor—we just heard about it over here from the Senator from Ohio, and he is right—but how about the little religious minority? They are in the same category. They have no way, and it is just that I have been able to get on my radio and raise this money to pay these lawyers fees and to carry this case up, but we are crushed.

We are crushed, and if we did not have—now, this idea of Judge O'Connor, I think is fallacious, I think it is erroneous. I think that the Federal courts were established in order to protect our constitutional rights. You get down on the State level, as we are in New Jersey, we are a very liberal State. I have been in that State now 50 years; the pastorate I am in now, I have been there 48 years. Senator, I have been in every controversial subject that has come up in the State.

The liberal element in the State sought to kill our college. They actually did take away its license. We had to go to Florida. We came back 2 years ago. We got up to the same trouble again and, Senator, they told us when we went up to get our license in Trenton that in order for us to give a degree they would have to approve of our Bible courses. They would have to approve of our Bible teacher. We said, well, that is the last.

Then we fell back on our first amendment rights. We went ahead and began to operate, and on November 15 or November 14 the Attorney General's assistant called me and said, "Dr. McIntire, tomorrow we are going into the State court, and I am just giving you a courtesy call."

I said, "Oh, please don't do that. You are going to tie us up in all kinds of—let us come and sit down. Let our attorney sit down. Let's discuss this."

"No, this is just a courtesy call." We went into the superior court in Atlantic City the next day, they asked that our college be shut down that day because we did not have a license, and our students turned out on the street, and the semester was not over. The judge accommodated them by saying, "You cannot advertise, you cannot recruit, and on December 22 you close your college down while we continue with the hearings."

It took him a year before he got his decision. In the meantime we did go, Senator, to the Federal court in Trenton, and the judge looked at it and he said, "Well, here, they cannot close this college down," and he gave an injunction against the State court permitting us to continue to exist, but he heeded the O'Connor doctrine and reserved to the State court the actual consideration of the merits of the first amendment, the free exercise of religion.

Senator, the State of New Jersey was so upset by the fact that an injunction had been placed against this court closing the college down that they appealed to the Third Circuit Court in Philadelphia to ask the judges there to rule that the district Federal court should not have issued that injunction. The third circuit court ruled that the Federal district judge was within his discretion in his injunction.

The State did not like that so they took the third circuit court's decision over to en banc. They got up there and they lost 8 to 2. Now they have appealed and the appeal has now been filed with the Supreme Court on the State's demand that the Federal court should not even have interfered to the extent of issuing an injunction, and Judge O'Connor will be sitting there when this comes up before it.

Now, Senator, this is not all the story. The college, Shelton College, then reappealed the Federal judge in the State, the district court, reappealed his to the third circuit court on the ground that he should have just handled the whole case and not involved this back again in the State. When we got there, the third circuit court said, "That is right. Your first amendment rights are involved. You have a right to exist without a license."

Senator, we went back then, and by this time the State court—we are in a big fight between the State and Federal courts, has been going on 2 years, and Judge O'Connor is right in the middle of this thing with what she says in her article. The State court then gave its decision in favor of the State board of education; our college had an injunction against it to close us down, and we could not operate.

We then, Senator, went back and the Federal judge heard the case and has issued an injunction against the State court, and now we are on the way up through the State court, superior court, the appeals court, to the Supreme Court, and we will come back around some day to the Supreme Court. I do not know how many years it will be, but in the meantime our little college sits here, suffering.

Senator, I do wish that we could have gotten this before the entire committee and let them see. When I hear these men say that if something special or extra would come up, Senator, Judge O'Connor is going to be dealing with these things. She would not give us any specifics but here are concrete illustrations of how the thing she says she is for has worked in the State of New Jersey. We want the Federal courts to be there where we can run to them any time we want to go there, to protect the life of our college.

I think that gives you—now we are in the midst of that right this very minute, Senator, and it is costly. It has cost us students; it has upset our college, and we are suffering.

The CHAIRMAN. Well, maybe you misconstrued her position some. If she is confirmed, Dr. McIntire, I think you will find she will be very fair toward these Christian schools.

I am glad to have you here. Thank you for coming and thank you for your testimony.

Dr. MCINTIRE. Thank you, Senator.

[Material follows:]

Statement by Carl McIntire
September 9-11, 1981

To the Judiciary Committee of the United States Senate Requesting that the confirmation of Judge Sandra Day O'Connor be laid aside

Mr. Chairman and members of the United States Senate:

My name is Carl McIntire. I reside at 426 Collings Ave., Collingswood, N. J. I am pastor of the Bible Presbyterian Church there. I appear in my capacity as the President of the International Council of Christian Churches. This is an agency set up by Fundamental churches over the world. The ICCC has a membership of 334 Protestant denominations in 86 nations. One purpose, its constitution says, is: "to maintain and defend by every proper means the rights of the member bodies and associated bodies against interference with their liberty to fulfill their God-given calling."

I am here to deal specifically with the First Amendment to the Constitution of the United States. It declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."

Our Fundamental, Bible-believing churches and pastors in the U.S. have suffered incalculable loss at the hands of the U.S. Supreme Court, which not only refuses to hear our cases but is responsible for abridging our religious freedom. It has been the hope and prayer of many Christians that President Reagan would give us a "new beginning" on the Supreme Court, too.

Judge O'Connor has made her position in the William and Mary Law Review so clear that we cannot accept it and her.

(I request that her article in the Law Review be inserted in the record, if it has not already been done. Also insert The Memorial to the President and Congress of the Arizona State Legislature, which she successfully in the State Senate led in defeating. This Memorial called upon the president and Congress to give full First Amendment rights to broadcasters in "programming.")

Here are two areas where the Fundamentalists' constitutional rights of free exercise of religion have been denied.

What must be recognized is that there is a religious upheaval in the country. Churches and people are separating from major denominations and leaving the National Council of Churches and the World Council of Churches. When this is done, the rights of these people are then denied by the courts and particularly the Supreme Court. This covers the whole range of religious activities, religious services, church properties, Bible Conferences, FCC regulations, IRS legislation, Justice Department decisions, civil rights taking preference over religious rights, mailing permits for religious papers, the granting of visas, chaplains in the Armed Services, recognition of accrediting agencies, the restriction of international congresses, and general bureaucratic harassment. There is hardly a realm of religious activity where these new and separated religious bodies are not suffering and being denied their "free exercise of religion" here in Washington, D.C. The Fundamentalists are in trouble down here.

Judge O'Connor in her Law Review thesis goes into the question of the "friction between state and federal courts." She argues in favor of the state courts' handling constitutional questions, with the federal courts' being prohibited from intervening. She argues for the acceptance of the state courts' judgments and for the diversity of limitations of federal courts. This is not just a matter for Congress, but it is a power in the Supreme Court itself to restrict its lower federal courts with the further implementation of the Burger court doctrine of "abstention." She argues at great length. In fact her treatise reveals her to be a reformer for both state courts and the Supreme Court. She is an activist in this arena.

I speak now from bitter, costly experience in case after case and constant court litigation for the past 16 years.

After my church broke away from the United Presbyterian Church because of its new Modernist doctrines and apostasy, we started a Bible Conference in Cape May, N. J., called the Christian Admiral. The City of Cape May refused to give tax exemption on this property. The state law provided for exemption under the free exercise of religion. The litigation consumed six years and cost more than the taxes would have cost. The highest tax court of the state gave full tax exemption to the Bible Conference. When the appeal was taken up to the State Superior Court where the state political pressures abound, it was reversed. Finally when the case reached the Supreme Court of the United States, it refused to look at it. And though the city gives tax exemption to the Bingo Hall run by the Roman Catholic Church in the center of the city, our Bible conference pays taxes on the hall where daily and Sunday religious services are conducted. There is now no appeal. Judge O'Connor's views of state court decisions as being accepted, prevailed. This is the only Bible Conference in the state that pays taxes. But we are the separated Presbyterians with a great deal of opposition.

A second illustration: I am chancellor of Shelton College, a Fundamentalist liberal arts, Christian college whose motto is "Training Christian Warriors." The State of New Jersey will not permit any school on the college level to operate unless it is a part of its "system of higher education" under its planning and direction with a license required to force this submission. When the college refused, the Attorney General of New Jersey for the Department of Higher Education entered the State Superior Court in Atlantic City and demanded that it be closed. The judge ordered the school closed down, December 22, 1979, pending his further hearing. The college then went to the Federal District Court in Trenton to save its life under 42U.S.C. 1983, the civil rights statutes. The Federal District Court enjoined the lower court from closing the college but left to its litigation the decision whether the college could give degrees and be under the state system of education. But the state, not satisfied with this measure of victory, went immediately to the U.S. Third Circuit Court in Philadelphia arguing the position of Judge O'Connor that the Federal Court should have abstained entirely. This would have closed the college down, which the state was determined to do. But the Third Circuit said that the District Court was within its discretion to act as it did.

This developed into a major conflict between the Federal and State courts over the Burger-O'Connor position. So determined is the State of New Jersey to maintain Judge O'Connor's view of noninterference and limitation of federal jurisdiction under the "abstention doctrine" being developed by the Burger court that when the Third Circuit Court refused to enjoin the District Court for enjoining the State Court, New Jersey appealed to the full Circuit Court "en banc." It lost 8 to 2. Now it has appealed to the U.S. Supreme Court where Judge O'Connor may be sitting. If the Supreme Court accepts the case, then it will have one question before it, the Judge O'Connor view, whether the federal court should intervene while the state court was hearing a constitutional question and settling it.

Presently the litigation on the religious rights, their merits, is on appeal from the State Superior Court to the State Appeals Court. It must then go to the State Supreme Court and then to the Federal District Court and up the line to the Supreme Court. It has already taken nearly two years and five courts, and the cost is nearing $200,000. It is the O'Connor position that caused so much trouble and expense.

The courts are fighting among themselves for power. It was only the Federal Court that saved even the existence of the College.

But small religious groups cannot survive this.

Under no circumstances should Judge O'Connor, with the views she expounded concerning the federal courts' deferring to the state courts and accepting state court decisions on constitutional matters, be free as a member of the Supreme Court to help direct its course along this road in future years. Religious freedom is fighting for its very life. How many times does religious freedom have to be aborted and destroyed before it becomes a determining factor on who sits on the Supreme Court?

What I am saying does not pertain or relate to what she said in the Law Review article about Congress's limiting federal jurisdiction; though in this area of First Amendment rights, it could be perilous, since religious rights are not in the general consciousness of the Congress or the courts today.

All this pertains directly to the Supreme Court and its implementing the Burger doctrine of abstention.

This led the federal district judge at Trenton, when he took the case under section 1983, to restrain himself from taking the case. He only lifted the injunction which would have killed the college immediately. He saw and said that the First Amendment right of the college was involved and that by prior restraint, its life was at stake, but he still referred the case, rather than handle it himself, back down to the state judge. After a year the state judge ruled as the state desired, that the college had to be a part of the system of education directed by the State Department of Higher Education and secure a license. The State Department of Higher Education maintained that it had to approve the Bible courses and Bible teachers before Shelton could give any degrees as a college.

Thus the state court issued its permament injunction against the college.

The college, which also had appealed to the Third Circuit Court in Philadelphia against the State District judge's not taking the case in hand and settling it, received a favorable decision from the Third Circuit Court, declaring that the college was religious and was free to operate under the First Amendment without its licenses.

The college then went back a second time to the Federal District Court in Trenton and secured a second injunction against the New Jersey Superior Court, which enabled the college to make its appeal and operate fully as a college, giving its degrees pending its appeal. This injunction does stand pending the lengthy litigation that is still ahead, when at some future time the First Amendment issue will reach the Supreme Court, where Judge O'Connor may be sitting. Without federal court intervention, which her position restrains, the political powers of the State of New Jersey would have their way with a dead college because it was not licensed to their satisfaction.

What I am reporting here, Senator, is reality. A Fundamental Christian College is paralyzed and penalized because of the Supreme Court. Just the cost of litigation and the years now involved make it impossible for these new religious groups, breaking away from the larger denominations which they believe are departing from the faith, to get started again. The Puritans and the Presbyterians could never have started Harvard or Princeton with a Supreme Court like ours today.

(May I ask that there be inserted in the record the letter I wrote the President, August 20, asking him to withdraw his nomination, on the basis of Judge O'Connor's views concerning the state court as it relates to our religious minority in which I give further details essential to the full picture.)

Another area is the entire radio world. Eight thousand radio stations in this country have to be licensed by the FCC. Here again is a case where religious freedom and the freedom to preach the the Gospel have been destroyed, I say destroyed. Two celebrated cases are WXUR, a Pennsylvania religious station owned by Faith Theological Seminary, of which I am the president, and KAYE, owned by a Fundamentalist preacher operating in Puyallup, Washington, by the name of Jim Nicholls. Religious interests of the United Church of Christ, representing the National Council of Churches, were instrumental in having the FCC remove these stations from the air. The radio stations of this country have been intimidated, frightened, and the door has been opened for religious opponents, as in the case of the Greater Philadelphia Council of Churches' leading the fight to silence WXUR, making it impossible for stations to be free in their programming.

Here, Senator, I tell you, that after eight years of litigation, the Supreme Court would not hear the case of WXUR. When it reached there, the question of First Amendment rights was the main issue. All that was left when the U.S. Court of Appeals, District of Columbia Circuit, finished was the question of the "programming" that had been listed on the original application before the station even broadcasted a word to the public. David Bazelon, the chief justice, said the FCC had no business under the First Amendment requiring the knowledge of programming in the application as a condition for the license. The other two judges dismissed that and maintained that the application was defective since it was alleged the station did not reveal the full intention of its programming and therefore was fraudulent. When the case went to the Supreme Court, it refused to hear it. The station died July 5, 1973. Here is the quotation from Judge Bazelon: "In this case I am faced with a prima facie violation of the First Amendment. The Federal Communications Commission has subjected Brandywine [WXUR] to the supreme penalty: it may no longer operate as a radio broadcast station. In silencing WXUR, the Commission has dealt a death blow to the licensee's freedoms of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views."

The death of this station caused several hundred stations to drop Fundamentalist broadcasts that dealt with "issues," including my own, the 20th Century Reformation Hour, for fear of complaints and the owners' unwillingness to take the risk financially and the threat of losing the total investment in their station, as WXUR did. The Supreme Court is responsible for this; and the State of Arizona Memorial, which Judge O'Connor helped defeat, has only to do with freedom in "programming." May we face it. There are political leaders who do not want freedom of speech on the radio, and we know that these ecumenical church leaders are determined to keep from the public any effective exposure of what they have done to Christianity, how they have been helping the Communist cause over the world, in various ways, and by their "liberation theology" and their Program to Combat Racism. The Supreme Court of the United States is responsible for the restriction of speech for the Fundamentalists. With Judge O'Connor sitting on that bench, the uncertainty which confronts us is intolerable.

(I request that my letter to the President of the United States, dated August 13, which gives great detail of this point, be inserted into the record.

I also mention another area where Judge O'Connor's decision could turn the whole course of religion in the nation. She will be there long after most of us are dead. My congregation is one of the churches in this country that lost its valuable property to which they alone held the deed. We left the United Presbyterian Church, as I said, because of conscience; we could not have fellowship in a church where different gospels were being preached. I helped found the Bible Presbyterian Church and led in the separation. On the "implied theory" which the Supreme Court maintained, the property of our church was given to eight individuals out of 1200 to the whole denomination. We had to leave and start up again in a tent. Our religious faith and conscience required that we separate. After these years, in September, 1979, the Supreme Court voted 5 to 4, in the case of the Vineville Presbyterian Church of Macon, Georgia, that the implied trust view no longer governed, but the reading of the deed determines the ownership.

Several Episcopal churches in New Jersey have left the denomination over the question of faith, including ordaining homosexuals. The Supreme Court of the State of New Jersey voted 4 to 3 for the implied trust view against the deed view. This case is now awaiting acceptance by the U.S. Supreme Court. Judge O'Connor could be sitting there. Other cases are now coming to the Court asking for a reversal of the 5 to 4 decision. With her deep commitment to the state side, she could in such constitutional matters turn all this around again. Her one vote could do it. Freedom should not take this chance. We are back again to these pressures to accept state judgments as she has advocated in the William and Mary Law Review.

At stake in all this is the whole future of Christianity and the churches in the United States. But this is not the business of the U.S. Senate. All we want is a Supreme Court that will protect the free exercise of religion "without respect" to technicalities, to size, or denomination or pressure or court jurisdictions which will and do destroy it. O'Connor's view on the state courts is fatal to the Fundamentalists. Federal courts are absolutely necessary to protect religious freedom at any stage when necessary to run to them. Up to the present the court has been on the side of the "ecumenical" churches. It has ruled against the Fundamentalists who oppose the ecumenical movement. Religious leaders despair and do not go to the court. They cannot, so they suffer loss. The greatest suffering is loss of religious freedom.

Senator, I cannot express the frustration, the futility, the incredibility of having to fight for religious freedom in the United States. Four Federal judges on the lower level have recognized that First Amendment rights were there. Three of them in the Shelton College case and one in the WXUR case, David Bazelon. That First Amendment rights are involved concerning Fundamentalists these judges have confirmed it.To add Judge O'Connor to this court with its far-reaching implications and complications does involve religious freedom.

Our founding fathers considered religion and the relationship of the people of the country to God their first priority. This First Amendment reveals that one conviction. The state could not interfere with religion; no law was possible. But we have a situation where the Supreme Court will not hear or will not give priority to religious issues. This is more accute because of the breaks now occurring in churches, and separations are on the increase. And courts are the final battlefield for religious freedom. These are the fresh and new struggles over the land. The issues raised by New Jersey over Shelton College are indeed a first and will determine the future for Fundamental Christian colleges in the 50 states and states' power and control over them. The protections in the Constitution have been dormant and latent. Now with the religious conflict and the apostasy of the National Council of Churches, they are of the most vital important to the future of the whole country. The Fundamentalists must have their liberty to stand for their faith, to oppose evil, and to fight for the standards of morality, in our national life which they believe are required by the Ten Commandments. These constitutional questions alone are sufficient to lay aside the nomination of Judge O'Connor. I respectfully request that this be done.

SHIELD FOR NEWSMEN CLEARS PANEL

(By Paul Schatt)

The Senate Judiciary Committee yesterday approved a bill extending the state newsmen's shield law to protect confidential notes, tapes and files, but rejected a memorial urging congress to ban government interferences with broadcast news.

The shield law amendment, which also retains a reporter's privilege to protect his confidential sources after he leaves his news job, was approved unanimously after the word "confidential" was added to limit the law's application.

Sen. Sandra O'Connor, R-Paradise Valley. Senate majority leader, moved passage of the bill after sponsoring the amendment to limit the protection to confidential sources.

Jonathan Marshall, publisher of the Scottsdale Daily Progress and legislative committee chairman of the Arizona Newspapers Association, said he had no objection to the amendment.

Marshall said the bill would close a loophole in the current shield law by providing protection for reporters after they leave the employer for whom they obtained the information by including notes, tapes, photographs and other material of the trade in the protection.

The law currently provides that a newsman cannot be compelled to testify or disclose in a legal or informal proceeding the source of information obtained for publication or broadcast. But it does not protect his notes, tapes or files.

Sen. Robert Strother, R-Phoenix, asked Marshall how he justified a reporter's failure to report a crime he observes in the course of his job.

Marshall replied that the bill does not apply in such cases, that a reporter would have a citizen's duty to report a crime he witnessed. But, he added, this is different from a situation in which a confidential source told a reporter of a crime.

"Almost every major scandal during the past 20 years was revealed this way," Marshall told the committee, "because some little guy talked with a reporter in confidence because he knew the reporter could protect his source. He would be afraid to tell the police for fear of losing his job or being killed."

The memorial on broadcast news freedom was severely criticized by Sens. Strother and O'Connor.

"I find, myself unhappily unable to suspect this because of its broad implications," Sen. O'Conner said.

She objected to wording in the bill asking Congress to prohibit any governmental agency from "dictating, influencing, or regulating in any way programming or content" of news broadcasts.

Strother, who said he found television news biased, contended that television stations should have responsibilities of accuracy in return for their government licenses to broadcast.

Sens. O'Connor, Strother and Trudy Camping, R-Phoenix, opposed the bill, Sen. William Swink, D-San Manuel, was the only "aye" vote, but acting chairman Sen. John Roeder, R-Scottsdale, said he favored the bill. Sen. Charles Await D-Safford did not vote.

This is to certify that the attached copy of "House Concurrent Resolution 2003" (two pages) and the copies of the "Minutes of Judiciary Committee" for April 9, 1973 and attached herewith were personally received by myself from the Secretary of the Arizona State Senate. The attached copy of a newspaper article was obtained from the main branch of the Phoenix Public Library and was copied from their files. It is from the Arizona Republic dated April 10, 1973.

REV. JIM NICHOLLS.

SEPTEMBER 14, 1981.

[From the Christian Beacon, Oct. 6, 1981]

Mr. Nicholls brought back more than 50 pages of documentation. Concerning Judge O'Connor's vote on the opposing of the Memorial to the President in Congress on the First Amendment rights of broadcasters, Mr. Nicholls secured from the *Arizona Republic*, April 10, 1973, an account written by correspondent Paul Schatt. The Memorial passed the lower house, and when it went to the Senate, Judge O'Connor's vote was decisive in killing and defeating it. Schatt reported the Memorial was severely criticized by Senator O'Connor. Mr. Schatt states Senator O'Connor said, "I find myself unhappily to support it because of its broad implication." She objected to wording in the bill asking Congress to prohibit any government agency from "dictating, influencing or regulating in any way programming or content of news broadcasts."

The vote in the committee on House Congressional Memorial 2003 was 3 against and 2 affirmative. One refrained from voting. It is reported that she led the opposition to it and was 1 of the 3. Had she voted for it, it would have gone to the full Senate for approval and begun its journey to Washington.

Senator Mathias in the O'Connor Confirmation Hearing stated that the electronic media was "The Press." This House Concurrent Resolution 2003 and attached Senate Judiciary Minutes and the newspaper article indisputedly shows that Senator O'Connor did use her legislative office in an attempt to keep government control on the programming and news content of the electronic media. In reality Senator O'Connor voted to deprive the Broadcaster of First Amendment Rights to a free press. Such action also deprived the public of their First Amendment guarantees, the "right to know" under a free press.

HOUSE CONCURRENT MEMORIAL 2003—STATE OF ARIZONA, HOUSE OF REPRESENTATIVES, THIRTY-FIRST LEGISLATURE, FIRST REGULAR SESSION

A concurrent memorial relating to American broadcasting; urging congress to enact legislation extending first amendment freedoms to the constitution to broadcasting.

To the Congress of the United States:

Your memorialist respectfully represents:

Whereas, the citizens' right to know requires the free and uninhibited flow of information from the broadcasters as well as from the printed news media to the public; and

Whereas, the First Amendment of the United States Constitution provides that the Congress shall make no law abridging the freedom of speech, or of the press; and

Whereas, American free broadcasting has become in its fifty-year history the practical enlargement of a free American press; and

Whereas, legislation now pending before the Congress would provide needed stability to the broadcasting industry in programming, and technological investment, in turn creating added broadcast service to the citizens.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the Senate concurring, prays:

1. That the President and the Congress give their most earnest consideration to the prompt enactment of legislation prohibiting government or any of its agencies from dictating, influencing or regulating in any way programming or content of news broadcasts on radio and television stations licensed to operate in the United States.

2. That the Honorable Wesley Bolin, Secretary of State of the State of Arizona, transmit copies of this Memorial to the President of the United States, the President of the United States Senate, the Speaker of the House of Representatives of the United States and to each member of the Arizona Congressional delegation.

MINUTES OF COMMITTEE ON JUDICIARY, ARIZONA STATE SENATE, THIRTY-FIRST LEGISLATURE, FIRST REGULAR SESSION

Date: April 9, 1973; Time: 9:00 a.m.; Room 309.

To: Senator Roeder, Vice Chairman; Senator Camping; Senator O'Connor; Senator Runyan; Senator Strother; Senator Awalt; Senator Swink; Senator Ulm.

Senators Corbet and Runyan were absent due to their attending the Arizona Town Hall. Senator Roeder conducted the Judiciary Committee meeting

CONSIDERATION OF THE FOLLOWING BILLS

H.C.M. 2003—First Amendment—Freedoms to Broadcasting

Mr. F. A. Higgins representing the Arizona Broadcasting Association spoke to the Committee stating that there is legislation before the Congress that would extend the licensing from 3 to 5 years. Senator O'Connor asked Mr. Higgins if this memorial would try to discourage Mr. Vice President Agnew from speaking out on vital issues and that he is trying to have the broadcasting industry give a more objective viewpoint of the news. Mr. Higgins stated that Mr. Agnew or anyone else has a perfect right to speak out against the press.

Mr. Jonathan Marshall, editor of the Scottsdale Progress, stated that there is a new executive agency headed by Mr. Whitehead who have instituted some tight regulations on the broadcasting industry and they are using scare tactics on the broadcasters.

Senator Swink moved the bill with a DO PASS recommendation. The bill failed

SENATE BILL 1303—Reporter's Privileged Communication

Mr. Jonathan Marshall stated that with the provisions in this bill a reporter could not have a subpoena served against him if he were to leave the employ of a media service. Senator O'Connor asked Mr. Marshall what would have happened in the case of the Kennedy and Wallace shootings if the reporter did not wish to turn over the films of these shootings to the authorities. After a brief discussion, Senator O'Connor moved the bill and proposed amendments to the bill. The amendments pass. The bill was moved with a DO PASS recommendation as amended and passed.

SENATE BILL 1267—Implied Consent—License Suspension

This bill had been in subcommittee chaired by Senator Roeder. John Jones of the Attorney General's Office spoke to the committee in regard for the need for the implied consent legislation. Senator Roeder introduced amendments that had been prepared in the subcommittee. Senator Roeder moved the bill with a DO PASS recommendation as amended. His motion passed.

SENATE CONCURRENT RESOLUTION 1022—Recall Election

Senator O'Connor moved this bill stating that this was a companion bill to House Bill 2020, initiative, referendum and recall. Without any discussion, the bill was moved with a DO PASS recommendation. The bill passed.

HOUSE BILL 2194—Destruction of State Property

Senator O'Connor moved this bill with a DO PASS recommendation. The motion passed.

The meeting was adjourned at 10:10 a.m. with the committee having completed their agenda.

INTERNATIONAL COUNCIL OF CHRISTIAN CHURCHES,
Collingswood, N.J., August 11, 1981.

President RONALD REAGAN,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: Your nomination of Judge Sandra Day O'Connor to the Supreme Court has projected afresh the question of broadcasters' First Amendment rights into the entire religious broadcasting world. The First Amendment guarantees, or it should, the protection of all religious activity and the free speech of all radio broadcasters. This Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

No judge, who will take an oath to support the Constitution, should ever sit on the Supreme Court of the United States who has not been in favor of, and who does not have an unbroken record of full support of the rights of radio broadcasters in the free exercise of religion, including their programming.

This Judge O'Connor has been guilty of, tragically guilty, at a moment when the whole question of broadcaster's rights to the full protection of their speech and religious activity has been before the country. In presenting this judge for the high bench, you have invaded an area of religious life and free speech in our country which has caused untold controversy, suffering and loss, and even the right of the people to know has been limited.

I am enclosing a copy of a Memorial to the President and Congress of April, 1973. This passed the lower house in Arizona and it was Judge O'Connor's leadership that defeated it in the Arizona Senate. The committee to which it was referred for approval and recommendation, voted 4 against it, 3 for it, and one abstained. She led the opposition to this, and was one of the four. Had her vote been in the affirmative, this resolution would have been approved. You will see it is actually headed "House Concurrent Memorial 2003. A concurrent Memorial relating to American broadcasting; urging Congress to enact legislation extending First Amendment freedoms of the Constitution to broadcasting." Its request is: "1. That the President and the Congress give their most earnest consideration to the prompt enactment of legislation prohibiting government or any of its agencies from dictating, influencing or regulating in any way programming or content of news broadcasts on radio and television stations licensed to operate in the United States."

The controversy that stirred the radio world at that time was the decision of the FCC to remove from the air radio station WXUR, owned by Faith Theological Seminary, of which I am the president. There was not a radio station in this country that was not aware of what was happening. My broadcast, the 20th Century Reformation Hour, heard over 600 stations, was dropped by stations all over the land. This controversy began in 1965 when area groups under the leadership of the Greater Philadelphia Council of Churches, the New Jersey Council of Churches, a part of the National Council of Churches, sought to have the station's license denied. The battle went up through an examiner of the FCC, who gave the license to the station declaring that the charges against it by the religious leaders and the Broadcast Bureau itself could not be sustained.

Mr. President, the House of Representatives of the State of Pennsylvania passed Resolution 160, December 14, 1965. The House was controlled by the Deomcrats. The Resolution referred specifically to the 1964 Goldwater campaign, saying that his ideas had been repudiated by the country and specific references was made to my ideas which they equated to Goldwater's, saying that they were dangerous to the country.

The FCC under Dean Burch, chairman appointed by Mr. Nixon, reversed their examiner's decision on July 1, 1970. This was in the midst of all the conflict over the Vietnam War, and I had led the first March for Victory on April 4, and we were building for the second March on October 3, which Vice-President Ky had agreed to address. At the height of all this, when I was using my stations over the nation attacking Hanoi and exposing the yippies' and hippies' support of the Communist cause to the division of our country, this move was made by Dean Burch, Robert Lee, who wrote their decision, and Benjamin Hooks, who represented the NAACP and who has been so active recently against your program.

We then went to the United States Circuit Court of Appeals in Washington. This court threw out the major claims or the opponents of the station and the FCC itself. All that was left was the question of programming, that the station in its original application did not fully reveal its program so that the FCC could determine whether the station could be licensed or not. David Bazelon, the chief justice, claimed that there was violation of the First Amendment in requiring these program stipulations, and he declared that the station and the broadcasters had been denied their First Amendment rights. He wrote a magnificent decision in support of the First Amendment, specifically stating: "In this case I am faced with a Prima facie violation of the First Amendment. The Federal Communications Commission has subjected Brandywine to the supreme penalty: it may no longer operate as a radio broadcast station. In silencing WXUR, the Commission has dealt a death blow to the licensee's freedom of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views."

This was specifically over the FCC's requirement in its application of the knowledge of the program of the station. The Arizona Memorial to the President and Congress specifically identified the question of programming, with the request that it be protected and kept free. O'Connor's opposition was against the exact issue and almost the same language as the WXUIR case—the FCC had to approve programming before a license could be renewed.

The Supreme Court, Mr. President, refused to review the case and on July 5, 1973, the station died. The whole radio world was shaken. Our defenders in the Senate were Sam Ervin, who gave a 6,000-word speech, Jesse Helms, Strom Thurmond. They all declared that the First Amendment rights of the station were denied in their speeches recorded in the Congressional Record. See Congressional Record, November 14, 1973, for Ervin; March 12, 1974, for Thurmond; and February 21, 1974, for Helms.

Letters immediately reached me from all over the country from radio stations cancelling my broadcasts. In Washington, D.C., I was heard every morning at 8 a.m. on WFAX, Falls Church, VA. The owner, Mr. Lamar Newcomb, immediately removed my program, though he had supported my position. He said he could not take the risk of losing his station or becoming involved in expensive litigation. The WXUR litigation took 7 years.

It was station WFAX that so many in high places in Washington listened to, including the State Department and the Defense Department, and it was this one station that L. Mendel Rivers, chairman of the House Armed Services Committee, listened to.

He personally contributed to the broadcast. He was the one who called me to organize the marches for victory in the war in Vietnam. This I did with the help of thousands in the country.

I was broadcasting every day in Phoenix, Arizona, and other stations in the state. It was out of this conflict in Arizona that I spoke in Phoenix a number of times, and here there arose this very resolution from the state legislature. The Pennsylvania legislature had taken its stand against the First Amendment rights. Arizona was taking its stand for First Amendment rights for broadcasters.

I can assure you that this issue was so acute in the State of Arizona that, at the hands of the fundamental preachers, there were very few people who were unaware of the issues involved. Judge O'Connor was in the State Senate at this time. This was before she went into the court. There she was the leading opponent and fought the enclosed Memorial to the President and the Congress of the United States that the First Amendment rights be guaranteed to us broadcasters. This pertained directly to religious broadcasters such as myself. With me was Mr. Jim Nicholls, of KAYE of Puyallup, Washington. The same religious groups that led the fight against me and the Faith Seminary station led the fight against him. He, too, lost everything.

It has been my custom to attend every meeting of the National Council of Churches since the days when it was the Federal Council of Churches back in the early 30's. The chief spokesman for the NCC in this whole area is and has been the United Chruch of the Christ Office of Communications, Dr. Everett Parker in charge. Dr. Parker has prepared the studies, distributed the literature throughout the churches of the country concerning how they can have objectionable broadcasts removed, intimidate stations, threatening them with even the loss of their license, using the death of WXUR as their costly exhibit. Dr. Parker maintained a booth at the Detroit meeting of the NCC and we were out there with a counter rally opposing their Modernism and socialism. At their booth they were distributig their literature and telling the people that this was the way they could have Dr. McIntire's broadcast removed from their local stations.

Thus here comes Judge O'Connor, if confirmed to the Supreme Court, who also lived through those tumultuous days of battling for First Amendment rights for broadcasters. The denial of freedom became a routing matter and a formula was devised by the FCC and its liberal companions to destroy speech and to inhibit the free exercise of religion for the Fundamentalists. Congress cannnot make a law, but it can make bureaus, and the bureaus' regulations have the force of law.

The Supreme Court is the last bulwark of freedom in the protection of the First Amendment rights of religious minorities. Mr. President, a minority can never become a majority unless it can speak and promote its position. The condition of our country as far as speech on the radio is concerned is that it is not possible to expose the National Council of Churches for what it is doing in this area of socialism, its aid to the Communists and its misrepresentation of Christianity.

H. Gifford Irion, the original hearing examiner for the FCC, who after nine months of hearings wrote a 116-page opinion, predicted what would happen. In favoring the station, he said that WXUR-AM and WXUR-FM "performed what would normally be considered a wholesome service in providing an outlet for contrasting viewpoints on a wide variety of subjects. To impose the fell judgment of removing WXUR from the air . . . could only have the consequence of admonishing broadcasters everywhere that they would act at their peril in allowing robust discussing because penalties would be meted out in rigid compliance with the exactions of the rules."

For eight years the station has been preserved with its four towers lighted. We have been praying and believing that this great injustice to speech and to a religious minority would be reversed and the station returned to the air. Sam Ervin said outside political pressures did it. The prayers of thousands is that some day God will bring to life, perhaps on the Nixon tapes, what these pressures were from the highest level of government. God knows it all. God is also a protector of liberty for His people.

This generation of fear did exactly that to my broadcast, and others dared not enter this field to enlighten the American people. As the prophet Hosea said, "My people are destroyed for lack of knowledge."

Men like myself who have come up out of the Christian churches and have a duty before God to preach what the Bible says and expose what we believe is evil, not only in the country but in the churches, find it cannot be done. I am here in Collingswood, New Jersey, and I have been pastor of this one church for 48 years. My record is clean. I am of the opinion that this country cannot be saved unless we are free to expose what we believe are forces inimical and destructive not only to Christianity but to liberty.

You are placing a judge on the Supreme Court who opposed a beautiful, clean resolution. You, yourself, could not have written a better one. None can mistake the "Whereases" that are here.

The fight for freedom of speech and free exercise of religion on radio is still the major battle under the Constitution today, and you are having placed on the Supreme Court a judge who in this particular field has made clear where she stands and the FCC still has a canopy of control over programming today. With these views the FCC will have a judge on the court to their liking, and so will Dr. Everett C. Parker and the National Council of Churches.

Mr. President, you have come up the hard and difficult road to see this nation turned about, but to place on of the nine judges on the court, in a day when the court itself is ideologically divided as you yourself recognize, who did not support the First Amendment rights of broadcasters in this nation, requires that we request that you withdraw this nomination. I am confident that you are unaware of this question concerning her attitude which has come to light as a result of the special investigation Mr. Nicholls made in Phoenix, Arizona.

If we had had our First Amendment rights, free exercise or religion, and could have used it to warn and instruct this country by radio and television, the country could have been turned about a number of years back. The failure to have this freedom has contributed to the havoc that the liberals have wrought in our national life in the economic sphere, the military sphere, and in the whole realm of our spiritual and moral standards and necessities.

This fight for our First Amendment rights has taken a terrific toll. The tragedy is that men in political life, too few to them, are willing to get up and fight for the rights of a religious minority and even for those with whom they differ but whose rights are the same as theirs under that blessed Constitution.

I cannot believe that you yourself are unaware of this major battle for free speech and religious liberty that has been raging in this country over radio programming since the early 60's, but I am confident that you were unaware of her opposition and her part in defeating this Memorial calling for the First Amendment rights of broadcasters. It was headed, "House Concurrent Memorial 2003." It is interesting that the Congressional Record, July 31, contains the statement by Senator Barry Goldwater, introducing "House Concurrent Memorial 2001 to the President and Senate of the United States of America. Your memorialist respectfully re represents . . ." this Memorial, which was adopted, commends Judge O'Connor. The one dealing with First Amendment rights was never fully approved. The Senator maintains that since 2001 was adopted in the Arizona House on July 23, with 51 ayes: only 2 nays and on July 24; in the Senate, there were 29 ayes and 1 nay, that here is an indication "that the single-issue opposition to Mrs. O'Connor's nomination has virtually disappeared."

The "single-issue" refers to the abortion issue. Aside from the fact that this has not disappeared in the country, the issue that I am raising here is new, is real, and indeed is of such weighty importance that as a single issue alone it should disqualify her from a lifetime position on the Supreme Court of the United States.

Now you, Mr. President, in your inauguration January 20, took the oath of office required by the Constitution to maintain and defend it. Here comes the question of the opposition of Judge O'Connor to the full First Amendment rights of broadcasters, and you are in the position of not knowing that she let the battle against a resolution calling for full First Amendment rights for all broadcasters. This is not right. Surely I am bringing to your attention a situation that calls for action before the conscience of the entire nation.

Last Saturday Senator Strom Thurmond, who has spoken for us over the years at our Bible Conference in Cape May, N.J., addressed around 500 people. In the question-and-answer period, has was asked concerning Judge O'Connor's confirmation. He announced that they would begin on September 9 and said that there were 20 men on his committee and that she would be confronted with every conceivable relative question. He told the congregation that he would presonally see that Dr. McIntire would have the opportunity to appear before the committee. I had previously filed my request to be there as a representative of the International Council of Christian Churches. I will, of course, raise this very question and expect to make it known to the Senate.

I poured out my life over a period of 16 years fighting for our religious liberty on the radio as a broadcaster. At the time of the death of station WXUR I went out on the Atlantic Ocean, beyond our territorial limits, opposite our Bible Conference in Cape May, and erected a 10,000 watt transmitter on a ship on a wave length not used by American stations and broadcast from Maine to North Carolina. I called the station Radio Free America on the ship "Columbia." The story made the front pages of papers all over this country. We wanted the world to know that the most precious rights a human being has were being denied by the FCC and the Supreme Court. We made the mistake of not securing a ship under foreign registry. We obtained a former mine sweeper from Florida and brought it up the east coast. Because of its U.S. registry, the FCC took us to the federal court in Camden, N.J., and had the judge issue an injunction against me.

This country cannot survive without free speech, and we are losing the battle today because men like myself cannot talk as we believe God wants us to speak as His chosen servants to preach the whole counsel of God as found in the Holy Bible.

Speeches made by the prophets Jeremiah, Amos, Isaiah, Hosea, and even our blessed Lord would have brought them before the FCC of Jerusalem and the license of their radio broadcasts would have been denied.

I was in addition to this issue also hoping that in the appointments that you make, especially in the FCC, that these matters could be taken into consideration, I am certain now that they were not, since we have received a present pronouncement of the Federal Communications Commission on WXUR.

I propose to write you another letter dealing with the FCC setup. Mr. President, we have to have the Constitution honored by the United States Government, by every official, every representative, every agency, including the FCC. The Constitution is the supreme law of this land. It is the greatest possession of the American people, and the most important part of its is the First Amendment. The most important of that has to do with religion and with speech which is outside the domain of government, the executive, the legislative, and the judicial branches.

It is in this area that Judge O'Connor's actions in dealing with the Memorial from Arizona invaded and transgressed. Again I request that by God's grace you may withdraw her nomination.

You have our earnest prayers.

Very truly yours,

CARL MCINTIRE,
President, International Council of Christian Churches.

INTERNATIONAL COUNCIL OF CHRISTIAN CHURCHES,
Collingswood, N.J., August 19, 1981.

President RONALD REAGAN,
The White House,
Washington, D.C.

MY DEAR MR. PRESIDENT: I wrote you August 11 concerning the free exercise of religion, protected in the Constitution, against which Congress is in no way to legislate or prohibit according to the First Amendment. The instance which I presented was Judge O'Connor's opposition which led to the defeat of a memorial from the State of Arizona to the President and the Congress in April of 1973. It called for action by both parties to restore full First Amendment rights to broadcasters.

I now come with another major issue concerning First Amendment rights of a religious minority of which I am definitely a part. It has to do with current litigation initiated by the State of New Jersey in a state chancery court against Shelton College, Cape May, N.J., of which I am chancellor and which is an agency of the denomination of which I am a part, the Bible Presbyterian Church. That First Amendment rights are involved, the courts we have been in all concede. These are the New Jersey Superior Court, the United States District Court [District of New Jersey], the United States Third Circuit Court of Appeals and then back again to the U.S. District Court.

The state court maintains that the state has an overriding interest because of the degree Shelton gives, and had ordered the College closed December 22, 1979.

The State of New Jersey, through its Department of Higher Education, under instruction from its Governor to its Attorney General on one day's notice, entered a chancery court in Atlantic City on November 15, 1979, and asked that a temporary injunction be granted to close the College down that day without even a hearing. The court actually enjoined the College that day from advertising and recruiting and said it had to close December 22. This judge then did not issue his final decision until November, 1980, a whole year minus three days.

The only thing that saved the College and allowed it to exist, was the intervention of the U.S. District Court in Trenton under Civil Rights Act, section 1983.

I give you this brief statement because Judge O'Connor's opinion in this area is well defined and there can be no question about the position she will hold on the Supreme Court in the years to come. Her William and Mary Law Review article has been widely heralded in the press as a basis for claiming that she "understands state problems." In her conclusion she said, "We should allow the state courts to rule first on the constitutionality of state statutes." She called for "elimination or restriction of federal court diversity jurisdiction, and a requirement of exhaustion of state remedies as a prerequisite to bringing federal action under section 1983." She is actually a champion of this new setup which she said would be "a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions. . ."

Under these circumstances our Shelton College would now be dead. The state wanted it closed even during the hearing. The judge under state appointment, nominated by the Attorney General, accommodated him.

If we had not had access to the Federal Court, there would be no Bible Presbyterian college in New Jersey today.

The State Superior Court, that ordered the College closed, actually found in its opinion that "the conduct and beliefs of the Shelton student and the theological doctrines which form the content of the academic program are at total variance from secular and most church-sponsored colleges and universities." Judge Philip Gruccio in the same statement said, "Every academic subject is taught from a perspective of the religious point of view of the fundamentalist denominations, whether it be history, art, economics, chemistry or English literature."

In spite of these findings, he closed the school down because it did not have a license from the state and refused to be a part of the "system" of higher education.

It is being argued that Judge O'Connor's position, which calls for the acceptance of the judgment of the state court, would eliminate extensive litigation in criminal cases where constitutional rights are alleged to be involved.

But where do the First Amendment rights come in, the free exercise of religion of a Fundamentalist Christian college, which is accredited and which is preparing leaders and "Christian Warriors," as the motto says, for our churches?

The State of New Jersey, that is the Attorney General, the Department of Higher Education under the Governor's direction, took the College to the U.S. Third Circuit Court of Appeals in Philadelphia. Here the issue was that the Federal District Court in Trenton had no right to interfere in the state's litigation while it was in process. They called it "abstention." A jurisdictional battle developed, with a state court including in its opinion a major defense of its authority, credibility and capability. The Federal court, exercising its discretion, which it believed it had, stepped in to save the life of the College, deferring to the state court whether the College could give its degree for the credits that the College was providing for its students while it continued to exist. The Federal District Court actually retained the jurisdiction pending the final outcome as a cover to protect the College after it gets through with the litigation that is now in the State Appeals Court and has to go to the State Supreme Court. Mr. President, here are five courts, and here sits our little college with irreparable and unimaginable suffering and damage to our religious cause and rights.

Now the state's Attorney General is appealing to the U.S. Supreme Court with their papers to be filed by September 2, asking the U.S. Supreme Court to rule that the Third Circuit Court was in error in sustaining the Federal District Court in using its discretion to lift the injunction of the state court and permitting the College to exist.

If Judge O'Connor is confirmed, she will be sitting on this court to decide the question brought before it, and this is only the question of jurisdiction, and her views on this very point are spelled out in the William and Mary Law Review article.

The Third Circuit Court, however, in ruling on the question of the District Court's discretion, did go in on the merits of the case of the free exercise of religion. Here a beautiful statement is made concerning the right of the College to exist and carry on its work without the control by the process of licensing and without being regulated as a part of the state system of education.

So here we sit today, the first case of its kind in the history of the United States. In the State of New Jersey today, no course in an institution, college or university level, can be taught—no single course—neither can a teacher teach that course without his or her qualifications being approved by the State Board of Higher Education.

The thing that really brought this to a head, when the College was trying to work out the state's terms of licensing, was when the state declared that even the Bible courses taught in the College would have to be approved by the state before the credit could be used for a degree. Even the Bible teachers who taught in the College would have to have their qualifications approved by the state before they would be permitted to teach.

This was the breaking point, and we decided as a college that we would throw ourselves back on our constitutional rights. So here we are, almost two years have passed and we are only one court above the State Superor Court. We are now in the Court of Appeals.

If the U.S. Supreme Court accepts the Attorney General's appeals on the jurisdiction matter, we will soon be in the U.S. Supreme Court, too, with a little college paying all the legal expenses for a major jurisdictional fight between the Federal Court and the State Court, with Judge O'Connor already on record in favor of deferring to the State Court and prohibiting any Federal intervention, under section 1983 of the Civil Rights Act, until all the state's processes have been completed.

We have always believed that the Federal court system was set up to protect the free exercise of religion of any religious group or minority from any interference by the state legislative requirement or attack from federal legislation, and now I must add the regulations of the bureaus.

To think of Judge O'Connor sitting on that court, first, in hearing the question of jurisdiction and, second, in hearing the question of the right of the College to exist in the state without the license, when she is so clearly on the side of the state jurisdiction and power is to us a grave danger.

Should not our religious rights, First Amendment rights, take precedence over all other considerations? The framers of the Constitution thought so when they framed the First Amendment with these words placed first, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ." There is nothing more important than our religious freedom. It has now been denied us by the State Superior Court. The state is of the opinion that if they can destroy the Federal Court's judgment on the technicality of jurisdiction, the College will then be dead, pending the further litigation on the state level.

Mr. President, you have been a governor and you know the power of a governor and his appointments.

I have spent my entire life as a preacher in this state—two and one-half years in Atlantic City and 48 years in Collingswood. I have been most outspoken as a Fundamentalist. I have opposed about everything that has come down the road; the race track, bingo, the Atlantic City casino, sex education, abortion on demand, taking prayer and Bible reading from the schools. I have been active in the religious field exposing the liberals, and the ecumenists. We are a part of a religious movement that calls upon God's people not to support the things that deny the Gospel and cast doubt upon our blessed Saviour, His virgin birth, His sinless life, His death, His resurrection, His ascension and His coming again. We have been exceedingly vocal, for the Bible says, "Cry aloud, spare not, lift up thy voice like a trumpet, and shew my people their transgressions, and the house of Jacob their sins" (Isa. 58:1).

To do this is costly, but the liberty to do so is priceless. Everywhere we have turned we have met opposition from the political forces that have power. We opened a Bible Conference in Cape May. After four years of litigation, the state's highest tax court said that we were entitled to tax exemption on our Bible Conference property, but these government officials went into the state courts and had it reversed. When we knocked on the door of the Supreme Court, they would not look at it. We are the only Bible Conference in the State of New Jersey that has to pay taxes. The tax court said No, but the state courts said Yes. We no longer have any appeal except to God.

Now we are going up the same route with our Christian college. Mr. President, we have to have a college. Our churches are entitled to have a college. We cannot build our churches, our doctrine, our position in the religious world without a college.

Does not one small college count anymore when it comes to liberty?

On July 4, 1962, President Kennedy stood before Independence Hall and made his address on Interdependence which contravened our Declaration of Independence and specifically called for the surrender of some of our sovereignty. There was a great outcry against this at that time.

His retreat at the Bay of Pigs was also a national issue. I was among those who believe that once putting the hand to the plow, we should have dealt with Castro and liberated Cuba. All the mischief that he has caused was because of the nature of Communism, we were certain. If Kennedy had gone ahead, he would have enabled us to honor the Monroe Doctrine.

As far as I was concerned, we were dealing with these matters on our radio. President Kennedy was to speak to the National Council of Churches in Philadelphia. His views were in line with theirs and he was to give them great prestige and coverage. We opposed it. I arranged for a large counter rally at the same time in which General Edwin A. Walker had agreed to speak on the issues of our standing up to the Communists. He was against detente and so were we.

Just five days before this, Kennedy was assassinated.

It was out of this that Ralph Dungan came forth. The Governor of our state, Richard J. Hughes, was tied in very closely with the Kennedys. He brought Dungan to New Jersey, a man not qualified to be the head of the Department of Higher Education. It was political pure and simple, and then Dungan went after our College to stop the training of Christian warriors.

Hughes was then appointed to be Chief Justice of the New Jersey Supreme Court and that tells a story. We have lost every time we went up there.

This drive of the state to take Shelton College to the Supreme Court of the United States on this "abstention" issue against the Federal Court has gone to the very limit. The Third Circuit, I said, refused to nullify the action of the Federal District Court in lifting the injunction. The state then appealed to the Third Circuit en banc for a review of its own decision. It lost 8 to 2. It is from this that they are appealing to the Supreme Court where Judge O'Connor may be sitting.

Mr. President, the State of New Jersey is desperate in its determination to keep this power in its hand through their court. We are dealing with the ideological conflict that has divided our country and which you yourself have declared to be on the side of a new beginning, returning us to the basic concepts of freedom.

I tell you that men are interested in power, courts are the last arena for the exercise of that power in their final victories.

This is why we are so careful and so insistent in regard to Judge O'Connor's confirmation. Do not let the courts be taken away from us. We have a generation that has risen up, baptized in this halo of liberalism. Just look at the decison of Judge Gruccio and see how he had to crucify the Constitution in order to confer the crown of victory to the state's liberals. He did it and a small religious minority is the victim.

This matter is going to cost us at least a half million dollars before we are through, if we can save the College. Under these circumstances, it is impossible for new religious minorities, coming out of the separations and conflicts in the church world, to get started with their schools. We cannot do what our Pilgrim Fathers did, have a new beginning when they came to this new world. We are ready to die for this new beginning and liberty. Please look at these matters. This condition has been developing and evolving over these years, where the liberals have been in ascendancy.

Our trouble started when Dr. Ralph Dungan became head of the newly formed Department of Higher Education in New Jersey. He had been John F. Kennedy's aide in the White House, who was there the day he was assassinated. Johnson sent Dungan to Chile as an ambassador. There he supported Allende. The Chileans called him the "pinko ambassador." We have Fundamental churches in Chile: Presbyterian, Baptist, Methodist, Christian and Missionary Alliance and independent, which belong to the International Council of Christian Churches, of which I am the president. Dungan got to know these churches and what they stood for. They opposed Allende's Marxism.

Dungan had only been in New Jersey a few months before he launched his attack against Shelton College. It had held a state license and had carried on its work. Dungan initiated hearings and when he was through, he had the College's license revoked in 1971. It fled to Florida. When it returned in 1979, it ran into the same opposition again.

What I am trying to tell you is that in these state levels, there is room for pressures, mischief, the designs of men to get at an institution and individuals that they do not like or they fear. To leave the state courts in the position of independency free from any protective interference by the Federal courts is intolerable. We do not see that Judge O'Connor should be on that court with these questions and doubts. The constitutional rights which we have from God are too precious to take any risk.

She made her case in that Law Review article from William and Mary College in Virginia.

I have not mentioned anything yet to you about the financial impossibility. The State of New Jersey was able by its attack upon the College to initiate litigation where its side of it is paid out of the state treasury but our side of it has to come from the churches and individual Fundamental believers who see that the issues are religious liberty. Harvard, Yale, Princeton, the Ivy League, were all started in the same way, and for the same purpose that Shelton College was started—by religious leaders, to provide education for the leaders of the colonies' churches.

Our country was a haven for the Pilgrims, Puritans, for those who fled religious oppression from the old world the Anglicans, the Lutherans with their state churches, and those who fled from the Roman Catholic hierarchy of France and other European states. William Penn came to Pennsylvania because he wanted the kind of religious freedom that Shelton College is fighting for today.

Have we become so insensible, so numbed, so blinded, and so intolerant, that a tiny religious college cannot exist in a state where the state officials are determined to close it down unless they direct it as a part of the system of education that the state legislature has given them total control over?

Our sufferings are real. Our losses are irreparable. But, Mr. President, our faith in that Constitution is our one hope for free America. Unless we can preserve that, our nation will be gone.

There are fifty states, and if in only one of these states, the State of New Jersey, the constitutional rights of a religious minority are denied, that is sufficient to keep a questionable judge from the Supreme Court, where her decisions will affect all fifty states. I plead with you, please withdraw the nomination. She has written only fifty opinions in the appeal court in Arizona. Give us a judge who will support the Federal system and protect us all from any repetition of what has happened in the State of New Jersey. Please let us end this jurisdictional fight between the state courts and the Federal courts which Shelton College is having to pay for, to the tragic loss of building our churches. How large does a religious denomination have to be or a college enrollment before it can have the protection of the entire country in support of its liberty? I do not believe that this should be ignored.

Please withdraw the nomination and find another judge who favors the Federal judication of religious constitutional rights.

The struggle of our people to keep this country from going socialist or surrendering to the Communists is not only over the presidency and seats in Congress but over the Supreme Court, where the judges there by judicial interpretation may change the country and even the Constitution. O'Connor's appointment could not possibly be more important to the liberty of Fundamental Christians and churches.

We have not been able to get our story into the press. This Sunday the Atlantic City press did carry a story. You will be interested in reading it.

You have our prayers as the chief magistrate of this land. We are commanded by God to pray for you in all your responsibilities as His servant as the Bible says, "to us for good." You are indeed a minister of God to us for good. You are there for the punishment of evildoers.

Very truly yours,

CARL MCINTIRE.

The CHAIRMAN. Our next witness is Ms. Arnette R. Hubbard, National Bar Association.

Are you the president of the National Bar Association?

Ms. HUBBARD. I am, Senator.

The CHAIRMAN. Hold up your hand.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. HUBBARD. I do.

The CHAIRMAN. You may proceed.

TESTIMONY OF ARNETTE R. HUBBARD, PRESIDENT, NATIONAL BAR ASSOCIATION

Ms. HUBBARD. Mr. Chairman and distinguished members of the Senate Judiciary Committee, I am Arnette Hubbard, a practicing lawyer from Chicago, Ill. I am pleased to participate in your hearing today on behalf of the National Bar Association, now entering its 57th year.

As the 30th president of the oldest and largest association of black lawyers in this country, and as the first female attorney ever to hold this office, I have particular pride and honor in making this appearance to testify in support of the first woman nominated to serve on the Supreme Court of the United States of America. At the same time I am also humbled and distressed by the fact that no other major bar association has ever had a woman to serve as its president.

As you may recall, representatives of the National Bar Association have appeared before this committee on many occasions to address the issues of competence and commitment to equal justice of candidates nominated to serve on the courts of this country. Needless to say, the National Bar Association has acute interest in the appointment of any nominee to the Supreme Court of the United States of America.

The history of blacks in the legal profession has, in some respects, loosely paralleled the involvement of white women in the profession. Just a century ago blacks, newly freed from legal slavery in this country, looked to the law as a protection and a tool to effectuate their newly established rights. Negative case law, practice, and State legislative action limited the use of the law in initially securing equal rights, equal protection, equal opportunity, as well as equal obligations.

It is noteworthy and paradoxical at the same time Congress and the Nation added constitutional amendments to clarify the citizenship of former slaves and formalize their freedom, at that moment women sought unsuccessfully to convince the courts that they should be permitted to practice law.

Fortunately, blacks and women, often represented by and representing the finest in the legal profession, have moved forward from the negative case law and practices of a century ago. A black now serves with distinction on the highest court of the land, and he and his colleagues will be joined by a woman, Sandra Day O'Connor, if confirmed.

Judge O'Connor's nomination and her anticipated confirmation mark an historic development in the history of the Court and in the long chronicle of minority and women's rights. Judge O'Connor will be the 102d Justice to be appointed and the first woman to serve on the Supreme Court in its 191-year history.

The National Bar Association has reviewed Judge O'Connor's background and qualifications. We have acquainted ourselves with her career as a lawyer, legislator, prosecutor, and judge. Our criteria for assessing this candidate for the Supreme Court of the United States of America have mirrored criteria used to determine whether we supported or challenged persons nominated and considered for the U.S. courts of appeal and district courts.

We have reviewed as well Judge O'Connor's 29 appellate court decisions and her law review article in the William & Mary Law Review to gain additional insight into her future performance as a Justice of the Court. While we have found that much is noteworthy, we have been unable to ascertain Judge O'Connor's position on several thorny constitutional issues which we deem of crucial importance. We are not entirely troubled, however, by what appears to be an absence of a clear pattern that would help to predict her position on these questions, given our belief in the inherent wisdom of a process which elevates standards of judicial competence and integrity above those of personal ideology.

The National Bar Association believes that Justice O'Connor has demonstrated—excuse me, Judge O'Connor, I anticipate the appointment—has demonstrated those qualities needed in all judges:

that is, competence and professionalism, integrity, judicial temperament, and commitment to equal justice under law. Her record suggests that she will be a welcome addition to the Court.

Although the National Bar Association supports Judge O'Connor's nomination, we would be nonetheless remiss not to remind her of specific concerns of our constituency which we deem to be of the greatest priority. These concerns include not only and are not limited to the following: continued access to the Federal courts on behalf of the poor and politically unpopular groups; invidious attempts at gerrymandering political voting district, which have the effect of diluting minority representation in both State and Federal legislatures; lastly, continued concern for the protection of minority interests through a fair and aggressive interpretation of the 13th and 14th amendments to the U.S. Constitution.

Judge O'Connor's sensitivity to the full range of interests to be protected in her role as Justice is vital. The National Bar Association supports her elevation to the position of Justice of the U.S. Supreme Court of America.

We look forward to appearances before this committee as you consider other nominees for judicial appointments. It is, of course, our expectation that these nominees will include blacks and other ethnic minorities and women.

Today we join many of our colleagues in the law in saluting the choice of Justice O'Connor—Judge O'Connor—and wishing her well. There have been questions about the significance of Judge O'Connor being a woman. We think she is not only a qualified person but she is needed, sir.

Decades ago, a burning question was, if the ability of a person is the only criterion, why are the Supreme Court Justices all white males? Mr. Justice Thurgood Marshall's appointment in 1965, 175 years since the creation of the Supreme Court, changed the question to, Why is it all male? The appointment of Judge O'Connor will eliminate the question entirely and permit us to address more deserving issues.

To the 40 percent of heads of households in this country who are women, to the approximately 50 percent of children born in America who are female, Judge O'Connor's appointment will say, yes, justice in America is for all Americans; yes, in America we believe you should be limited only by ability and determination. We then urge this committee to act expeditiously in bringing the nomination of Judge O'Connor to the Senate, and to support her confirmation.

The CHAIRMAN. Ms. Hubbard, I believe you are not only president of the National Bar Association but you are a member of the American Bar Association.

Ms. HUBBARD. That is correct, sir.

The CHAIRMAN. You are also a member of the Illinois State Bar Association———

Ms. HUBBARD. Yes.

The CHAIRMAN [continuing]. And the first female president of the Cook County Bar Association.

Ms. HUBBARD. That is right, Mr. Chairman.

The CHAIRMAN. You are a member of the Chicago Bar Association and the California Association of Black Lawyers.

Ms. HUBBARD. That is true.

The CHAIRMAN. You have a rather impressive record. I just want to congratulate you. We thank you for your presence and your testimony.

Ms. HUBBARD. I appreciate that, and thank you for the opportunity to appear.

Dr. MCINTIRE. Senator, I understand that my printed text will be included in the record, as well as what I said.

The CHAIRMAN. Without objection, Dr. McIntire, we will include your statement in the record.

Dr. MCINTIRE. I wanted to make sure but I also ask that the resolution from Arizona that we talked about—and I have that——

The CHAIRMAN. Without objection, we will put that in the record, if you will just hand it to the reporter there.

Dr. MCINTIRE. I have the two letters that I wrote to the President on this. They are not too long. I would like to have them in, too.

The CHAIRMAN. Without objection, we will put those in.

Dr. MCINTIRE. Thank you.

The CHAIRMAN. Our next witness is the Honorable Dick C. P. Lantz, judge, 11th Judicial Circuit of Florida and president-elect, American Judges Association. If you will come around, Judge Lantz, hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge LANTZ. I do.

The CHAIRMAN. Have a seat, Judge Lantz, and you may proceed. You understand how these lights work—when it gets red, your time is up.

Judge LANTZ. I have been here all day and I have been watching very admirably, and I think I understand the rules.

The CHAIRMAN. Our time is running short.

TESTIMONY OF HON. DICK C. P. LANTZ, JUDGE, 11TH JUDICIAL CIRCUIT, AND PRESIDENT-ELECT, AMERICAN JUDGES ASSOCIATION

Judge LANTZ. Mr. Chairman, honorable members of the Committee on the Judiciary, ladies and gentlemen, my name is Judge Dick Lantz of the Circuit Court of Dade County, Miami, Fla., 11th Judicial Circuit. I have served as a municipal judge, county judge, and circuit court judge since 1972.

I have the honor of being the president-elect of the American Judges Association, and will be installed as president on October 29, 1981 at the annual convention which will be held in Washington, D.C. The American Judges Association consists approximately of 2,000 judges who presently sit at all levels of the judiciary. They include members of the Federal bench, State supreme and appellate courts, municipal, county, and circuit court judges throughout the United States and Canada.

One of the paramount objectives of the American Judges Association is to strive for the improvement of the quality of members of the bench, as well as the conditions of the office, including tenure, retirement, workload, emoluments, and physical facilities. Further, the association seeks to educate its members in modern approaches to jurisprudence, and in innovative programs we attempt to instill respect for the law in the public at large and in students and youth in particular.

Our association has over a dozen working committees. One of these national committees is the selection, retention, and retirement committee. This committee has been involved in the development of judicial qualifications and selection guidelines. However, this is the first time it has involved itself in a Supreme Court confirmation hearing.

By correspondence and conference, this committee at my request addressed itself to the nomination of Judge Sandra O'Connor to the U.S. Supreme Court. I am happy to report that the consensus of this committee is that Judge O'Connor is an eminent jurist with an impeccable professional, social background. Her judicial opinions are found to be concise, scholarly, well-reasoned, and well-founded in the law.

Additionally, I have undertaken a personal review of Judge O'Connor based upon my nationwide professional and personal acquaintanceships with judges. My inquiry led to similar findings and opinions. As a matter of fact, not a single negative finding nor criticism in any respect was the result.

The American Judges Association applauds the fact that Judge O'Connor is a woman. However, we support Judge O'Connor because she is a qualified jurist who has paid her dues by hard work and devotion to the judiciary, and because she is worthy of the high office to which she has been nominated—not because she is a woman.

It is therefore the finding and opinion of the American Judges Association that Judge O'Connor is extremely and uniquely qualified to sit on the Supreme Court of the United States of America. As the American Judges Association's incoming president, I strongly endorse the nomination of Judge Sandra O'Connor and urge this committee to confirm her appointment.

I thank the Committee on the Judiciary, and particularly the chairman, for the opportunity to appear, and request that the American Judges Association be invited to appear in the future whenever it may be of service to the committee, whether in relation to future nominations to the Supreme Court or any other matter concerning the judiciary.

Thank you on behalf of the American Judges Association and personally. It has been a privilege and an honor to appear here before you today.

The CHAIRMAN. Judge, thank you very much for your presence and your testimony on this occasion.

Judge LANTZ. Mr. Chairman, I have a request that this report be made a part of the printed and permanent record of this committee.

The CHAIRMAN. How long is the report?

Judge LANTZ. It is very concise; it is 2½ pages.

The CHAIRMAN. Every typewritten page we have put in this thing is $3.50, and I want to save the Government all the money I can.

[Laughter.]

Judge **Lantz**. Well, if you make it single space it is about a page and a half but it is very important to us, inasmuch as the American Bar Association report is going to be part of it and——

The **Chairman**. Without objection, we will put it in at your request.

Judge **Lantz**. Thank you so much.

Mr. Chairman, I have had the privilege of watching you all day, and I know that you have not only acted in good faith but I do not know if I could have done the job that you have done all day in being fair and equitable to all the witnesses, irrespective of their background or irrespective of their opinion. I have to commend you for that.

Thank you, sir.

The **Chairman**. Thank you for your kind remarks.

The next witness here has to catch a plane soon, so we will call him up now: Father Charles Fiore, representing the National Pro-Life Political Action Committee. Father Fiore, will you come around? Is he here?

If you will raise your hand, some priests desire to use "affirm" rather than "swear." I will put both; use either one you want to.

Father **Fiore**. As you wish, Senator.

The **Chairman**. Do you affirm or swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Father **Fiore**. I do.

I do not mind swearing, Senator, under these circumstances, since God is my witness.

TESTIMONY OF FATHER CHARLES FIORE, CHAIRMAN, NATIONAL PRO-LIFE POLITICAL ACTION COMMITTEE

Father **Fiore**. First of all, Senator, I have submitted a text of my remarks which, with your permission, I would like inserted into the record, and I will spend the time allotted to me synthesizing those remarks if I may.

The **Chairman**. All right. Without objection, so ordered, but try not to duplicate.

Father **Fiore**. I will. Thank you, Senator.

Mr. Chairman, I thank you and the members of the committee for this opportunity to appear before you as founder and chairman of the National Pro-Life Political Action Committee, and on behalf of the tens of thousands of our supporters in all States and right-to-lifers everywhere who oppose the nomination of Judge Sandra Day O'Connor to the U.S. Supreme Court.

As you well know by now, Mrs. O'Connor's nomination by President Reagan has been the occasion of virtually unanimous disappointment on the part of rank-and-file right-to-lifers because it represents a breach of the 1980 Republican platform on which he ran, and on the basis of which he convinced millions of blue collar, traditionally Democratic ethnic, Catholic, and fundamentalist and evangelical Protestant voters to switch parties and vote for him.

I say these things at the outset not because they have any bearing on Mrs. O'Connor's qualifications but because they have something very much to do with the larger processes of representative government which are also at stake in these hearings.

Now the facts of Judge O'Connor's legislative and judicial careers are matters of public record and they have been amply set forth for examination by other witnesses who have already appeared before the committee, so I will not belabor that part of my testimony.

I had listened for the past 2 days to Mrs. O'Connor's explanations of her proabortion votes while a member of the Arizona State Senate, and I was especially interested to hear last evening from six members of the Arizona State Legislature. I must say I was impressed and moved by their testimony but it would have to come, I am sure, under the heading of being character witnesses for her probity and her good character.

However, Senator Biden yesterday underscored our reaction and puzzlement when he told Mrs. O'Connor that she had not answered most of the questions which had been posed to her. Senators Denton, East, Grassley, and Hatch, despite their best efforts, could not get Judge O'Connor to admit that she was anything more than "personally opposed" to abortion.

Now I appreciate her personal opposition to abortion but, for the record, those words since the 1973 *Roe* v. *Wade* decision have become a catch phrase used by many making public policy in our State legislatures and in the Congress, who on the other hand do not wish to do anything to protect the innocent unborn.

Senator, if I may digress for a moment, I would like to thank you for your statement a little bit earlier this afternoon in which you spoke to the fact that in your opinion the Supreme Court really did not have jurisdiction to do what they did on the *Roe* v. *Wade* decision. I am not a lawyer, I am not a Member of Congress, obviously, but I concur heartily in that judgment, as you know indeed many constitutional attorneys do.

Judge O'Connor rightly said she could not speak to how she might rule in any future case to come before the Court. She also said that she would not comment on the 1973 *Roe* v. *Wade* decision of the Court because, her explanation was, that matter might once again come before the Court as the subject of litigation.

On the other hand, busing might again come before the Court as a matter of litigation, and Judge O'Connor categorically said that she opposes busing. The death penalty might once again come before the Court as a matter of litigation, and Judge O'Connor said she favors the death penalty.

However, on the grounds that the 1973 *Roe* v. *Wade* decision might again come before the Court, in other words, on the same grounds, she again and again refused to give any direct or categorical comment on the legal or substantive aspects of the *Roe* v. *Wade* decision, or even on the matter of abortion itself. She would only say she was personally opposed.

Now what does that mean for one who will adjudicate laws that the legislatures will make? Is she opposed to abortion for other people, and not merely personally?

Mr. Chairman, we see no evidence of a change of heart or of mind on the part of Judge O'Connor from the proabortion stance that admittedly dominates her public record in the Arizona State Senate. We do now know what questions the President asked of her in his private meeting, or the questions that were posed to her by members of this committee in their private meetings with her.

I understand Mrs. O'Connor's ambition and desire to become the first woman Justice of the Supreme Court of the United States, a perfectly valid ambition. I find, however, her philosophy as exemplified in her record as a legislator and leader in the State Senate of Arizona clearly proabortion, and so on the basis of criteria set forth by the platform of the majority party in the Senate and by the President who nominated her, she would appear to be unqualified.

One final comment: All of us in public life must realize at times like these that our judgments are themselves subject to reexamination. I sincerely hope, as has been implied by members of the Arizona State Legislature, that she has changed her opinion on abortion. With Dr. Gerster, I hope that that is the case. In fact, I might even say I pray for that.

However, all of us will be subject to reexamination by the one judge who alone is just and to whom all of us must finally submit our thoughts and hopes, our words, our deeds, our very lives, all of which and each part of which ultimately will be germane. Mr. Chairman, Members of the committee, I ask that the Members of the Senate and in particular the members of the Judiciary Committee not confirm the nomination of Judge Sandra Day O'Connor, unless and until such time as she comments on these matters of her public record.

I thank you.

The CHAIRMAN. I do not believe there are any questions because there are no other Senators here, and I do not believe I have any questions. We thank you for your appearance here and for your testimony.

Father FIORE. I thank you, Senator.

[Material follows:]

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A [illegible] of our report is on file and may be purchased from The Federal Election Commission, Washington, D.C.

† Deceased

TESTIMONY
of the
Rev. Charles Fiore, O.P.,
Chairman,
National Pro-Life Political Action Committee,
Falls Church, Virginia
before the
Judiciary Committee
of the
United States Senate,
September 11, 1981

Mr. Chairman and Members of the Committee:

I thank you for this opportunity to appear before you as founder and Chairman of the National Pro-Life Political Action Committee, and on behalf of tens of thousands of our supporters in all states and right-to-lifers everywhere, who oppose the nomination of Judge Sandra Day O'Connor to the U.S. Supreme Court.

Mrs. O'Connor's nomination by President Reagan has been the occasion of virtually unanimous disappointment on the part of rank-and-file pro-lifers, because it represents a breach of the 1980 Republican Platform on which he ran (and which he more than once privately and publicly affirmed as a candidate), and on the basis of which he convinced millions of blue-collar, traditionally Democratic voters --

ethnic Catholics and fundamentalist-evangelical Protestants -- to switch parties and vote for him.

As a result, in the first six months of his incumbency, President Reagan may have seriously alienated major portions of the "social issues conservatives" who comprised the pro-life/pro-family coalition that helped elect him last November. Those same voters are intently watching these hearings, and will long remember and note well the final "ayes" and "nays" as the full Senate determines Judge O'Connor's qualifications to sit with the Court. As voters they perceive the members of the House and Senate not as party functionaries, but as their representatives first of all; just as they also perceive party platforms and election pledges not as "litmus tests," but as implied contracts to be fulfilled by those elected.

I say these things at the outset, not because they have bearing on Mrs. O'Connor's qualifications, but because they have very much to do with the larger processes of representative government, which are also at stake in these hearings.

The facts of Judge O'Connor's legislative and judicial careers are matters of public record, even though it appears that the Administration paid scant attention to them when evaluating her qualifications for the Supreme Court, even as late as the now-infamous Starr Justice Department memorandum hurriedly compiled a day or so before the nomination was made.

Briefly, as they pertain to the abortion issue, the facts are:

1. As a State Senator in 1970, Mrs. O'Connor twice voted for HB 20, to repeal Arizona's existing abortion statutes -- three years before the U.S. Supreme Court legalized abortion-on-demand, throughout the nine months of pregnancy, in all 50 states.

2. In 1973, Senator O'Connor co-sponsored a so-called "family planning" Act (SB 1190) which would have allowed abortions for minors without the consent of parents or guardians. The bill was considered by all observers in Arizona to be an abortion measure, and the Arizona Republic (3/5/73) editorialized, "The bill appears gratuitous -- unless energetic promotion of abortion is the eventual goal."

3. In 1974, Senator O'Connor voted against a bill (HCM 2002) to "memorialize" Congress on behalf of passage of a Human Life Amendment to the Constitution protecting the unborn.

4. In 1974, she voted against an amendment to a University of Arizona funding bill that prohibited use of tax-funds for abortions at University hospital, because Mrs. O'Connor claimed it was "non germane" and thus violated the state constitution. However, the bill passed with the amendment, and its constitutionality was upheld by the State Supreme Court.

It seems rather peculiar to us that Mrs. O'Connor, in discussing her legislative record on abortion with Mr. Starr of the Justice Department, could not remember her position on the first three votes, since they all represented dramatic departures from the existing laws and aroused national media attention. Yet she was apparently able to recall the far less significant fourth vote and her precise reason for it. Stranger still, was her attempt in the Starr memorandum to portray herself as a friend and intimate of Dr. Carolyn Gerster, M.D., Phoenix, titular head of the state right-to-life organization, when Dr. Gerster says it was well-known that she and Mrs. O'Connor had long been in heated opposition on these very votes.

The question looms large over Mrs. O'Connor's qualifications to sit as a member of the Supreme Court: Did she deliberately seek to mislead investigators for the Justice Department and/or the President as to the facts of her legislative record on this vital issue; did she give false or selective information in an attempt to portray her clearly pro-abortion legislative record as something else?

And if she did, what does that say about her ambition to accede to the high Court...and her moral strengths once part of it?

What price glory?

I raise these blunt and impolite questions because the matter of the right to life of the unborn is fundamental and critical to the health of our society. "The right to life," as also the rights to "liberty and the pursuit of happiness" are not "minor" or peripheral issues in our political process. Nor are they "private" any more than homicide is a "private" act if the unborn are human, as indeed every medico-scientific test affirms.

Because of the complicated and sensitive issues involved, at the very least we expect you to fully explore her philosophy and opinions on this issue of life versus death. If this judge be not guilty of the pro-abortion charge, let her proclaim her innocence loudly and clearly. Indeed, if she has changed her views, National Pro-Life PAC would be first in line to reconsider our opposition to this nomination.

As Professor William Bentley Ball, former Chairman of the Federal Bar Association's Committee on Constitutional Law, and one who has argued a number of religious liberty cases before the U.S. Supreme Court, recently wrote apropos of Mrs. O'Connor's nomination:

"Some zealous supporters of the O'Connor nomination...have made the astonishing statement that, on the Supreme Court of the United States, ideology doesn't count. They say...that it would be of no significance that a candidate would have an actual and proved record of having voted or acted on behalf of racism or anti-Semitism or any other philosophic point of view profoundly opposed by millions of Americans. These concerns are not dispelled by a recital that the candidate is 'personally' opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to forgo support of those practices?

"Philosophy is everything in dealing with the spacious provisions of the First Amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a 'strict constructionist' when, in these vital areas of the Constitution, there is really very little language to 'strictly' construe...

"It is likewise meaningless to advance a given candidate as a 'conservative' (or as a 'liberal'). In the matter of Mrs. O'Connor, the label 'conservative' has unfortunately been so employed as to obfuscate a very real issue. The scenario goes like this:

"Comment: 'Mrs. O'Connor is said to be pro-abortion.'
Response: 'Really? But she is a staunch conservative.'

"Just as meaningful would be:

"Comment: 'John Smith is said to be a mathematician.'
Response: 'Really? But he is from Chicago.'

"Whether Mrs. O'Connor is labeled a 'conservative' is irrelevant to the question respecting her views on abortion. So would it be on any other subject." (Emphasis added. Cf. Appendix for complete text, "The O'Connor Supreme Court Nomination: A Constitutional Lawyer Comments," from THE WANDERER, St. Paul, MN, Vol. 114, No. 31; July 30, 1981).

"Philosophy is everything..." says Professor Ball. And we concur. With these facts of her record in mind, and in the light of President Reagan's pro-life promises before, during and after the campaign, logically only three conclusions can be drawn:

1. Either Sandra Day O'Connor has changed her views, and is no longer a pro-abortion advocate ("personal opposition" does not necessarily translate into "public" opposition to abortion), or

2. President Reagan appointed Mrs. O'Connor without full knowledge about her public record, or

3. President Reagan was fully informed about Mrs. O'Connor's public record as pro-abortion, but chose to disregard it and the solemn pro-life promises he had made.

If, as it appears, Judge O'Connor and some of her supporters have attempted to cloud over or to minimize the importance of her pro-abortion record for the sake of these hearings, what does that say about her record? More, what does it say about her probity and candor?

Far from being unimportant, these questions are absolutely essential in judging the qualifications of one nominated to the Supreme Court of our land.

Mrs. O'Connor, although she has already testified and submitted herself to your queries, technically is still before this Committee, and may be recalled for further questioning by yourselves or other Senators.

She must be asked directly if she has changed her views on abortion since her votes in the Arizona State Senate. She must be asked specifically about each of those votes. She must be asked about *Roe vs. Wade* and *Doe vs. Bolton*, about parental consent to medical procedures on minors, and the other excellent questions Professor Ball raises in his article (*op. cit.*).

Should this Committee and the Senate fail to raise these questions with Judge O'Connor now, as previous Judiciary Committees did not hesitate to question Judges Haynesworth and Carswell on their records and philosophies, her nomination if confirmed will always be tainted, and history will record that the Senate rushed to confirm her for specious reasons and not her legitimate qualifications for the job.

Mr. Chairman and Members of the Committee, we see no evidence of a change of heart or mind on the part of Judge O'Connor from the pro-abortion stance that dominates her public record. We do not know what questions President Reagan asked Mrs. O'Connor in his private meeting with her, and so we do not know the practical value, if any, of her newfound "personal opposition" to abortion. On the contrary, we find evidence that one week after her conversation with the President (and before her nomination) she gave partial and misleading information on these very issues as they arise in her record, to an investigator for the Attorney General of the United States, at a time when she knew full well that she was being considered among the finalists for this nomination.

I understand Mrs. O'Connor's ambition and desire to become the first woman Justice of the Supreme Court of the United States.

I find her philosophy as exemplified in her record as a legislator and leader in the State Senate of Arizona clearly pro-abortion and so, on the basis of criteria set forth by the Platform of the majority party in the Senate, and by the President who nominated her, she is unqualified.

But all of us in public life must realize at times like these that our judgments are subject to re-examination, first of all by the public record which follows, and ultimately by the one Judge Who alone is Just, and to whom all of us must finally submit our thoughts, hopes, our words, our deeds, our very lives--all of which and each part of which will be "germane."

Quite simply, gentlemen, abortion goes beyond partisan platforms and political promises -- it is morally unjustifiable. For that fundamental reason, we urge all of you -- Democrats and Republicans alike -- to vote against the nomination of Sandra Day O'Connor to the U.S. Supreme Court.

The **CHAIRMAN**. Our next witness is Ms. Eileen Camillo Cochran, representing the California Women Lawyers.

Are you the president, Ms. Cochran?

Ms. **COCHRAN**. The incoming president.

The **CHAIRMAN**. The incoming president.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **COCHRAN**. I do.

The **CHAIRMAN**. You may proceed.

The yellow light is here and the red light is there. The yellow one is 1 minute, and the red one means your time is up.

TESTIMONY OF EILEEN CAMILLO COCHRAN, PRESIDENT-ELECT, CALIFORNIA WOMEN LAWYERS

Ms. **COCHRAN**. After 3 days, I know.

Thank you, Senator Thurmond, honorable committee members.

My name is Eileen Camillo Cochran, and I am president-elect of California Women Lawyers. I am here today to testify in support of the appointment of Judge Sandra Day O'Connor to the U.S. Supreme Court.

California Women Lawyers is the largest statewide organization of women attorneys in the United States. We represent the interests of the more than 10,000 women lawyers in the State of California. Our membership includes a cross section of the practice of law—corporate, government, and private practice, as well as the judiciary.

Moreover, our organization also includes a dozen affiliated bar associations, and I am also speaking on behalf of these organizations. They are Sacramento Women Lawyers; Women Lawyer's Association of Los Angeles; Queen's Bench of San Francisco; Lawyers' Club of San Diego; the Association of Northern California Black Women Lawyers; Southern California Black Women Lawyers; Orange County Women Lawyers; the Women Lawyers' Association of Ventura and Santa Barbara Counties; San Fernando Valley Women Lawyers; Inland Counties Women at Law; Women Lawyers of San Joaquin County; and Tulare County Women Lawyers.

Earlier you heard Justice Joan Dempsey Klein, presiding justice of the California Court of Appeals, Second District, Third Division, testify on behalf of the National Association of Women Judges. Justice Klein was the founding president of California Women Lawyers.

The primary purposes of our organization are to advance women in the legal profession; to improve the administration of justice; to better the position of women in society; and to eliminate inequities based upon sex. In keeping with our stated purposes, California Women Lawyers had been urging President Reagan to make this country's highest court truly representative of the Nation's entire population by nominating a woman Justice. Nevertheless, we stressed the equal importance that the candidate selected be one of impeccable credentials who was exceptionally well-qualified for appointment to the Supreme Court of the United States.

California Women Lawyers commends President Reagan for his selection of Judge Sandra Day O'Connor. Such a nomination demonstrates the administration's commitment to equal justice under law and recognition of the importance of an independent judiciary.

Sandra Day O'Connor will bring to the Court a unique combination of experience as a legislator, a government lawyer, a trial judge, and an appellate judge. The quality and breadth of her legal background evidence her outstanding credentials for this appointment. An honors graduate of Stanford University Law School, her entire legal career has been a progression of distinguished records of achievements and accomplishments. Her record reflects a commitment to the principle of equal justice under law.

California Women Lawyers supports the confirmation of Judge O'Connor because she is a highly capable and eminent jurist of outstanding quality. Sandra Day O'Connor is a person of intelligence, integrity, and discipline. Her presence as a Justice of our Nation's highest forum will serve as a model for all persons and will inure to the profound benefit of our society.

The **CHAIRMAN**. I do not believe there are any questions.

I want to thank you for appearing here today on behalf of your organization and presenting testimony. Thank you very much. You are now excused.

Our next witness is Gordon S. Jones, representing United Families of America.

Mr. Jones, come around. Mr. Jones, you have 5 minutes.

Hold up your hand and be sworn in.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF GORDON S. JONES, EXECUTIVE DIRECTOR, UNITED FAMILIES OF AMERICA

Mr. **JONES**. I do.

Mr. Chairman, my name is Gordon Jones. I am the executive director of United Families of America. I do have a prepared statement which I would like to have included in the record, and then I would like to make some separate statements, if that will be all right.

The **CHAIRMAN**. Without objection, that will be done. Try not to duplicate.

Mr. **JONES**. I will try not to duplicate.

Mr. Chairman, I also would like to congratulate you on the forthright statement you made about the propriety of the Supreme Court's action in 1973 in rendering the *Roe* v. *Wade* decision. I am a little bit afraid that you have disqualified yourself as a potential Supreme Court nominee, however, on the basis of testimony that we have heard over the last 3 days.

I confess, Mr. Chairman, that I am somewhat disappointed at the direction the hearings have taken, the apparent acquiescence in the idea that nominees to the Supreme Court should not be required or do not need to express their views on important constitutional and social issues.

In my prepared testimony I discussed some public polling data which indicate that the American people as a whole have lost confidence in the Federal judiciary. The data in the poll, which was a recent poll conducted by the Sindlinger Corp., indicate that 90 percent of the American people do not think that the Federal judiciary reflects their views. As many as 80 percent would like to see jurisdiction withdrawn from the Federal courts in such sensitive areas as busing and abortion. Almost 70 percent would like to see Supreme Court Justices elected, and nearly three-quarters would favor seeing Justices of the Supreme Court stand for reconfirmation.

The performance of this committee and Judge O'Connor during the nomination proceedings can only, in my opinion, widen that gap between the people and their judges. In fact, it appears to United Families of America that the committee is in the process of completing a total abdication of final policymaking authority to the Federal courts in the United States.

Judge O'Connor asserted during her hearing that it would be inappropriate for her to comment on the most important issues facing the American people and their policymakers today. To a very great extent, that simple assertion has been enough to discourage even the most tenacious cross-examiner on the committee, including former district attorneys.

That principle has been asserted in the past, of course, by other nominees, though I find it nowhere justified in the Constitution, in statutes, or in canon, but never in the past has it been acquiesced in so completely. In the case of past nominees, either there was an adequate public record so that close questioning was not really needed, or members of the committee persisted anyway in examining the nominee until they got the answers that they wanted after all.

During the hearings in the last 3 days, Judge O'Connor refused to answer Senator Metzenbaum as to the constitutionality of antitrust policy. She refused to answer Senator Laxalt about the constitutionality of the exclusionary rule. She refused to answer Senator Hatch's questions about the constitutionality of affirmative action. She refused to answer Senator Grassley's questions about the legislative veto.

Senator Dole asked her about the rights of aliens, and she declined to give an opinion on the constitutionality of limitations on the rights of aliens. Senator Specter talked about setting bail, and she declined to answer questions in that respect. She declined to answer anybody's questions about *Roe* v. *Wade,* with the possible exception of Senator Mathias who apparently asked her during a private visit to his office what she thought about that, and she—according to the New York Times—told him that she would abide by that precedent.

The fact is, Mr. Chairman, that Federal judges are policymakers. They are policymakers, moreover, who sit totally outside the democratic process. We cannot vote on them. They are appointed essentially for life, and once they are there, they are beyond our reach. Our only hope is that Senators during the confirmation process will ask them the kinds of questions that will elicit from them their policy views on the important issues which they will deal with on the Supreme Court.

If Senators will do that and nominees will be forthcoming about their views, then the American people can determine whether the Senators are acting responsibly in voting to confirm those nominees. When you allow nominees to refuse to answer questions of this type, you deny us the opportunity to render a political judgment on the only possible object of that judgment, Senators seeking reelection.

In the very brief time that remains, I would like to distinguish between a nominee's personal views and what her views or his views are of what the Constitution says. I do not care what Judge O'Connor thinks about abortion. Frankly, she can run an abortion clinic on the side and it will not bother me, so long as she cannot find in the Constitution an absolute right to abortion, which is what the Supreme Court did in 1973.

I reiterate that the issue is not abortion but judicial activism. *Roe* v. *Wade* happens to be the worst example of judicial activism in this century but there are many other examples of it. What we need to know is what Judge O'Connor thinks about the Constitution. How does she regard that? What previously undiscovered rights does she find there that nobody noticed in the last 200 years?

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Jones, for your appearance here and the testimony you have given. You are now excused.

[Material follows:]

STATEMENT OF GORDON S. JONES, Executive Director
UNITED FAMILIES OF AMERICA

Mr. Chairman:

I am Gordon Jones, Executive Director of United Families of America. UFA is a grass-roots lobbying group concerned with the entire range of social policy affecting the American family. We very much appreciate this opportunity to appear before your Committee, to discuss the nomination of Sandra Day O'Connor to the Supreme Court of the United States, the present state of the federal judiciary, and the relationship between the two.

To begin with, Mr. Chairman, we submit that the federal judiciary is in trouble. A public opinion poll conducted in May by the Sindlinger organization reveals almost shocking mistrust of the federal judiciary by overwhelming majorities of the American people. In fact, that poll reveals that only 10% of the American people think that federal judges reflect their personal views.

The federal bench is, of course, the least democratic of our governmental institutions. Its members are appointed by the President, typically confirmed after only cursory examinations of their credentials by the Senate, an examination which almost never touches on their broad political and social philosophy, after which they serve essentially for life, unchecked by any other institution, unreachable by the citizens whose lives they so closely regulate. Theoretically, the federal judiciary is an anomaly in the American Republic, and has been recognized as such from the beginning. It is not surprising that the American people should feel so cut off from their ruling class of judges. It is perhaps surprising to learn to what lengths they are prepared to go to correct their alienation.

For example, according to the Sindlinger Poll, nearly three-quarters of all Americans would like to see federal judges reconfirmed from time to time; nearly 70% would actually like to see them elected, as many State judges are. Better than 80% would like to see jurisdiction over such sensitive issues as abortion, school busing, and school prayers withdrawn from the federal courts;

80% would prevent the Supreme Court from overturning federal or State laws by less than a two-thirds vote; and a solid majority of 55% would like to see Congress be able to overturn Supreme Court decisions by a two-thirds vote.

These views of the American public clearly indicate the seriousness of the loss of faith experienced by the federal courts in recent years. Attacks on the Supreme Court are nothing new, of course, and I am not going to take the Committee's time to review them. That job has been done by such scholars as Louis Boudin, Sidney Hook, and Edwin S. Corwin, much better than I can do it, and I am sure the distinguished members of this Committee are already familiar with the philosophical issues here.

Nor would I like to suggest that United Families of America supports election or reconfirmation of federal judges. At this point, we are not suggesting remedies, merely pointing out that a dangerous situation exists, one that needs to be corrected before more drastic measures are taken against a judiciary which, unchecked, exercises intimate influence over the most basic institutions of our society. The influence of the courts, and in partiuclar the Supreme Court, is both direct and indirect, but it is pervasive. Writing in the current issue of The Public Interest, Mr. Edward A. Wynne describes the tenuous, but real, connection between decisions of the Court and the social attitudes of the American people. "Ultimately," he writes, "...the courts are significantly responsible for the present distressing situation in our schools. Courts, and judges, surely realize that their decisions not only shape case law, but also often determine climates of opinion. Those climates do not always bear a one-to-one correspondence to formal court decisions, but the relationship is usually traceable."

What Mr. Wynne says about the schools can be said, and has been said, about criminal law, about medical law, about regulatory law, and about every aspect of our increasingly legalistic society.

Thus it will always be when the makers of law are not responsible to those on whom the law must be enforced. And the federal courts are now the supreme makers of law in the United States, with all due deference to the members of this Committee, and the members of this Senate. In fact, it is largely due to the deference of this body, this national legislature, that that situation has come about. Through acquiescence by Congress (not always silent), the Supreme Court has come to be the Supreme Lawgiver, and now sits as a sort of continuing Constitutional Convention shaping and re-shaping the supreme law of the land to fit the prejudices of the day, or rather, the prejudices of a majority of the Justices. Members of the Court itself have made that case even more strongly than I do today.

If we are not to resort to the drastic structural changes in the Court mentioned as desirable by respondents to the Sindlinger Poll, how are we to re-establish some connection between the average person and the rarefied atmosphere of the federal bench? One way is through confirmation hearings such as this one. But the hearings will have to be conducted properly: they will have to concentrate on the essentials, which are much more philosophical and social than technical and experiential.

Since the American people cannot vote on their federal judges, it is imperative that they be given some way to judge the Senators who do vote on them. If the American people want judges who are tough on criminals, the Senators have to be willing to ask questions of nominees which will expose their views on criminal law. Then if the Senators vote to confirm a nominee whose views are squishy soft, that Senator can be brought to account at the polls.

If the American people want judges who will be restrained in the creation of new constitutional rights, the members of this Committee have an obligation to ask questions about the nominee's judicial philosophy. They have an obligation to insist on answers to those questions. If the answers reveal a particularly inventive nominee, and the Senate wants to confirm anyway, the vote of the Senators in favor can be used by their future opponents at the polls, which is where we normally exercise political control over government.

Nominees must not be allowed to refuse to answer specific questions. No one is suggesting that a nominee actually promise a vote on any specific issue. But I think the members of the Senate Judiciary Committee are astute enough to frame issues that will elicit the desired information. It is the will that has been lacking in the past.

The quintessential question for the purpose of revealing latent judicial activism is, of course, the Court's decision in The Abortion Cases, and that is why so much attention has been lavished on it during these hearings and since the nomination of Judge O'Connor. Roe v. Wade, handed down in 1973, is arguably the worst decision in the history of the Court; certainly it is the worst-reasoned, worst-argued decision of this century. That opinion is held not only by opponents of abortion, but by many of its supporters as well. Roe v. Wade has essentially no defenders as a matter of law, though it has many as a matter of policy.

But that is the point: Roe v. Wade was not a matter of law, but a matter of policy. In a policy determination the Supreme Court simply decided that there should be no restrictions on the liberty of abortion in the United States. It was a classic case of judicial legislation which remains a blot upon the books. In the case of a legislature which so egregiously misread the preferences of the American people, the recourse would be to the polls. But there are no polls which can reach Mr. Justice Blackmun. The author of this law sits beyond the reach of the people who pay his salary, who accord him deference, and who are forced to live (or in this case die) under his decree.

Roe v. Wade is an abortion case, but that is only incidental. The extension of judicial power would be as indefensible if the case involved contract law. In Roe v. Wade the Court simply invented a right that had not previously existed anywhere except in the wildest dreams of the National Abortion Rights Action League.

For those reasons, Mr. Chairman, UFA would argue that questions about Roe v. Wade are entirely appropriate. Not only are they appropriate, they are essential. We can tell more about the judicial philosophy of a nominee to the federal bench by the answers he or she gives to questions about Roe v. Wade than we can from answers to any other questions.

Specifically, Judge O'Connor should be asked whether Roe v. Wade was correctly decided. That question is just as legitimate as a question about the correctness of the Dred Scott decision, or Plessy v. Ferguson, or Brown v. Board of Education. The intent of such a question is not a focus on a "single issue," unless the attitude of a nominee towards judicial lawmaking is a "single issue." If it is, it is certainly a "single issue" with which this Committee should be very much concerned.

If Judge O'Conner responds that Roe v. Wade was correctly decided, United Families of America would have to oppose the nomination. Moreover, we think it would be the duty of all the members of this Committee to oppose the nomination. Such an answer would reveal in Judge O'Connor the very kind of penchant for judicial activism and irresponsibility which produces polls such as the one mentioned earlier. It would tell us far more about her than she reveals in saying that she is "personally opposed" to abortion. That statement is totally irrelevant. We are, and you should be, far more concerned about what she thinks the Constitution says about abortion than about what she thinks about it.

Should she make such a response, the Right to Life movement would have an obvious obligation to hold responsible at the polls those Senators then voting to confirm Judge O'Connor's nomination. That much is obvious. Less obvious is the fact that every group and individual concerned about limitations on the federal judiciary would have an obligation to hold those Senators responsible. That is so because as I said, Roe v. Wade is only incidentally an abortion decision. It is the leading case on judicial activism.

Should Judge O'Connor respond that Roe v. Wade was incorrectly decided, it would remain to ascertain how she feels about the doctrine of stare decisis. While there is much merit in respect for precedent in many areas of the law, there is no place for it in matters of basic constitutional law, and decisions distorting the Constitution should not be left unchallenged and uncorrected. That is as true for Roe v. Wade as it was for Dred Scott, and I pair the two cases advisedly.

Finally, Mr. Chairman, United Families of America would like to urge this Committee to adopt this line of questioning for all nominees to the federal judiciary. One does not hire employees without some examination of their suitability for the job. In the case of the federal bench, particularly the Supreme Court, the qualifications are restraint, conservatism, and an understanding of the organic fragile nature of large and complex polities. Formal training and experience are interesting, but not determinative. Questions of social philosophy and economics are at the basis of the controversies imposing strains on the American Republic now, as throughout our history. Attitudes towards those questions cannot be ascertained by looking at law school records and decisions on employee compensation. In fact, where these questions are concerned, Sandra O'Connor's actions as a State legislator may be far more revealing. Certainly they are troubling to many of us concerned about the direction the federal bench has taken. Absent any development of her views, which can only be demonstrated under questioning by this Committee, we are forced to reach conclusions about her suitability on the basis of that record.

Farther down the road, this Committee should give serious attention to the nature of the crisis in the judiciary. Pending in Congress right now are several measures which would impose restrictions of one type or another on the federal judiciary. These measures are reactions to a judiciary gone wild, unchecked in the expression of its will, and without effective counterweights. If the Congress does not impose those counterweights, the fragile bond holding our polity together will come unglued, just as it did in 1776. The tyranny is not dissimilar. In both cases it was imposed by a governing body out of reach of its subjects.

If we stand in the current crisis as Sam Adams did in the earlier one, it is within the power of members of this Committee to act the part of William Pitt. May you be more successful than he was.

Thank you.

The **Chairman**. Our next witness is Anne Neamon, representing Citizens for God and Country, and Truth in Press, Inc.

Come around, Ms. Neamon. You will hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF ANNE NEAMON, NATIONAL COORDINATOR, CITIZENS FOR GOD AND COUNTRY, AND TRUSTEE, TRUTH IN PRESS, INC.

Ms. **Neamon**. I do, so help me God.

Senator, I want to thank you for your undertaking, and in view of the fact that some of these matters have not been addressed to the candidate, would you kindly find opportunity to address them to her, please, in view of the omissions of every member of this body?

The nomination of Justice O'Connor occurs with continuing outcries from those who elected Reagan, mandating change, not compromise—restore U.S. Constitution, Christian law priority. Every nominee's background and intentions are vital at these times. Public right to know seeks answers.

Free nations are guided in law and jurisprudence by founding religious principles. Traditional Biblical morality, Christian ethics, guide good government and moral order against invasions by unconstitutional, shifting political whims, to secure all rights including diversity by individual rights, private means.

Quoting reassertions of the U.S. Supreme Court: "We are founded to legislate, propagate, and secure general Christian faith, which is and always has been our common law. Nothing be done to hurt Christianity. Bring infidels and savages unto human civility for a quiet and settled government. Morality of the Nation is deeply ingrafted in general Christian faith. We are a Christian Nation. Secularism is unconstitutional. It is the duty of government to deter no-belief religions. Government facilities"—and this includes abortions or whatever moral issue—"government facilities do not offend, commit inhibition, hostility, jeopardy, handicap, prohibition to Godly belief. Authority which can establish Christianity, with emphasis in exclusion of all other religions, as guides to good government. . . . Separation was never required. Scrupulous Christian neutrality was the issue." Our legislation and our security should be based on such values. (Holy Trinity, U.S. 143; Everson, U.S. 330; Engel, U.S. 469; Abington, U.S. 142, 119; Roemer, 74-730; *Stone* v. *Graham*, 80-321 (1980).)

Over 90 percent of taxes come from Christians, yet over 90 percent of deceptive, anti-Christian, anti-Semetic programs are converting U.S. Constitution, Christian law priority, to Soviet Constitution and "Communist Manifesto:"

> Propagate worldwide atheism, separation of church and state, classless society, communistic morality, centralized education, workers of the world unite.

Since the original U.S. Constitution has been recently and illegally altered, and misrepresented by foreign ideology, not only the nominee but every member of this committee is obligated to reaffirm in this public record loyalty to U.S. Constitution-Christian law priority.

By public right to know, then, the urgency to restore the original Constitution and address the moral crisis: One, will the nominee address the public pleadings of none other than Presid nt Carter and the late Senator H. Humphrey?

> We must all abandon corruption and greed and dedicate ourselves to family and morality in the interest of national security. Values, values, values.

Two, will the nominee challenge Court status of plaintiffs whose policies advocate foreign ideological changes to our Constitution, such as some members of the left-thinking membership of ABA, ACLU, and others who propagate communistic worldwide atheism? Will the nominee refuse to accept honorariums from such anti-Christian, anti-Semetic sources?

Three, return Bibles to courts, since Biblical morality guides law and jurisprudence and scriptural guides identify Justices as ministers of God—black robes a reminder? Will she address militant atheists who have no constitutional standing, since they disturb the moral order, safety, and peace of society? Quoting the U.S. Supreme Court: "They"—atheists—"do not interfere. There is nothing compatible. They go their own way. Nothing be done to hurt Christianity." What knowledge, obligation, loyalty does an anti-Christian, anti-Semetic have to "legislate, propagate, and secure general Christian faith"?

Four, address attacks against family and morality. Place women's rights in perspective with family rights, restoring the constitutionally guaranteed moral order; securing homes against TV invasions to indoctrinate Marxist paganism, and securing schools and churches against illegal coercions of international atheism?

Five, will she in Court action, and in duty above and beyond secure youth against official disorientation into crime, youth pregnancies, drug, alcohol, and social diseases?

Six, address media and other invading hostilities on falsehoods of U.S. Supreme Court cases, which do permit both legislated and unlegislated prayers for love of country, belief in God, for discipline, harmony, unity, and enhancing of teachers' authority, prayers and Bible for ethics, Biblical ethics, Christian ethics by nonsectarian Bible reading and prayers?

Seven, confine freedom of press and speech within the scope of the U.S. Constitution, Christian ethics as mandated by the intent of the Constitution—justice, tranquillity, and blessings of freedom, not vices?

Eight, in poorly structured cases, will the nominee defend against future harm by obligation due society, perceive disinformation strategies of the press for paganism, review legislative history of 36 U.S.C. 172, one Nation under God, "to protect our babes from rabid communism"? So identified in the legislative history of this law.

Nine, restore purity of free elections, denouncing totalitarian teacher-power and student-power, upholding first amendment neutrality to Godless belief, article 4, section 4, "guarantee republican form of government, and secure against invasions"?

Ten, will nominee acknowledge political brutalities of appellate power for labor unions, resulting in crime and violence, denial of human right to work, free enterprise, and consequences of critical inflation? Will she enforce strong warnings of former Attorney General Bell against appellate power for school prayers, threatening all liberties? State courts have proven not only incapable but unworthy, to wit, Kentucky Supreme Court, 10 Commandments case, Justices Lukowsky, Palmore, Sternberg, denouncing Biblical ethics and advocating atheism as guides to public administration. In such cases, will the nominee admonish such impeachable offenses, deny Court status for ACLU for its national policy to harrass all our institutions out of Christian law priority, by its national policy for Soviet constitutional separation of church and state? Will over 90 percent of the Christians in this Christian Nation be assured of loyalties to President Reagan's intent to restore and defend Christian law priority?

The CHAIRMAN. We wish to thank you, Ms. Neamon——

Ms. NEAMON. Senator, since these matters were never brought out by any member of the committee, in justice to the national outcries, the moral crisis, and the President's anxiety to restore U.S. Constitution and our ethics, could you find opportunity to address these questions to the nominee?

The CHAIRMAN. Well, you have made your statement. That will be available to all the Senators.

Ms. NEAMON. I wonder if they will find the time to really, collectively address it, and will the nominee have the opportunity to respond to their addressing of this matter?

The CHAIRMAN. Well, you see, the nominee now is through with her testimony, and it is too late to address questions in these proceedings.

Ms. NEAMON. Can she be recalled?

The CHAIRMAN. No; we cannot recall her. We are giving everybody an opportunity. We have had 3 days of hearings.

Ms. NEAMON. Thank you very much. I would appreciate it if there was anything you could do to extend your concerns, at least.

The CHAIRMAN. Thank you very much.

Our next witness is Stephen Gillers, representing the Committee for Public Justice, who is coming at the request of Senator Kennedy.

You will hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF STEPHEN GILLERS, COCHAIRMAN, COMMITTEE FOR PUBLIC JUSTICE

Mr. GILLERS. I do.

Mr. Chairman, I have also prepared a statement which I have given to the staff and which I ask be made part of the record. I will make some nonduplicative comments in addition to that, if I may.

The CHAIRMAN. You want this statement entered in the record in full?

Mr. GILLERS. Yes, sir.

The CHAIRMAN. Without objection, that will be done. Now anything you say now, say it in addition to what is there because we do not want to duplicate.

Mr. GILLERS. I will not duplicate it, sir.

Sitting through the testimony today, it is obvious that the witnesses, aside from disagreeing on whether or not Judge O'Connor should be confirmed, also disagree on the questions that the Senate should properly consider in deciding whether or not to confirm a nominee. That is, the scope of the Senate's responsibility seems to be, in exercising its confirmation power, a matter of some dispute.

It would be good, I suppose, if the scope of that power could be clarified, not during the rush of confirmation, and perhaps that possibility will be considered. But here we are and we have a nomination to confirm or not to confirm.

It is particularly important, Senator Thurmond, that the scope of the responsibility in deciding whether or not to confirm be assessed, because we stand at the beginning of a decade when we are likely to see five or six additional Supreme Court nominations made. That is a fact of timing; it is very likely to happen that we will be here again in the next 10 years another five or six times.

I would like to emphasize one aspect of my written testimony which deals with the Senate's responsibility at confirmation hearings. I do not believe the Senate sits as a body whose function is to enforce IOU's that one-issue constituencies feel the President gave them when he was elected but has now failed to honor. They may have real gripes—I understand that—but it does not seem to me that they should be able to use the confirmation process as the means by which his promise or his failure to keep his promise is enforced.

I believe the Senate is institutionally incapable of pinning down a nominee on each of the many areas of emerging constitutional law that its shifting majorities, its various Senators, may consider important. I realize that the people speaking against abortion today feel very strongly about that issue, and I was personally moved as a human being by the content of their testimony.

However, we are talking about a confirmation process, a constitutional process. As a law professor at New York University Law School, who has taught courses on Federal courts and in constitutional law, I believe it would be dangerous to our constitutional government and would ultimately seriously weaken the Court if a nominee's willingness to be pinned down on future votes on matters that are likely to come before the Court could be used as a condition for approval or disapproval of a nomination. Certainly it could raise questions of ethics should that nominee then proceed, if confirmed, to sit on a case in which he or she has already made a commitment.

In addition, whatever is the pressing issue of the day may be long gone as an issue by the time a nominee is half into his or her career on the Court. People sit on the Court for 10, 20, some in excess of 30 years. A nominee who is pressed with regard to an issue that may be emerging today, may be sitting on the Court long, long after that issue is forgotten. It seems to me that it is shortsighted in the extreme to emphasize a particular current issue over a nominee's character, history, intellect, judgment, and other qualities discussed in my written statement.

In sum, Senator Thurmond, it seems to me that the use of the confirmation process as a means to change emerging Supreme Court rulings is really a substitute for the amendment process which the Constitution itself prescribes for its change.

Thank you very much.

The CHAIRMAN. I would like to ask you, I do not believe you have said yet whether you favor or oppose the nominee. How do you stand, or do you stand?

Mr. GILLERS. I, and the Committee for Public Justice for which I speak, favor confirmation of Judge O'Connor.

The CHAIRMAN. Thank you.

[Material follows:]

TESTIMONY

of

STEPHEN GILLERS,

COMMITTEE FOR PUBLIC JUSTICE

I am an Associate Professor of Law at New York University. I am testifying on behalf of the Committee for Public Justice, of which I am a co-chairman. The Committee for Public Justice, formed in 1970, is a group of writers, lawyers, scientists, educators and other socially interested persons whose primary purpose is to call attention to dangers to public justice in American society. It has conducted studies of the Federal Bureau of Investigation, the Central Intelligence Agency, the Justice Department, the use and abuse of grand jury power, government secrecy, and the judicial appointment process. Since 1977, the Committee has published an occasional report entitled Justice Department Watch, which is read in and outside the Justice Department and excerpts from which have been printed in many newspapers and periodicals nationwide. One of the Committee's current projects is Supreme Court Watch, under which it will monitor appointments to the United States Supreme Court. It is in conjunction with that project that I testify here today.

I am testifying in support of the confirmation of Sandra Day O'Connor to the United States Supreme Court. On the other hand, if the Committee will indulge a fine distinction, I do not so much testify in support of Sandra O'Connor personally, but rather in support of the proper exercise of the Senate's institutional role in giving the President's appointment its "Advice and Consent."

A Brief History

The Senate has not been consistent in the standards it has used for weighing Supreme Court nominations. About the only definable trend which a reading of history reveals is that the rate of denial of confirmation has decreased markedly in this century.

There have been 101 men who have sat on the United States Supreme Court. There have been 51 nominations and 47 confirmations this century. Four appointees -- John J. Parker in 1930, Abe Fortas (to Chief Justice) in 1968, Clement F. Haynsworth in 1969, and G. Harrold Carswell in 1970 -- have not been confirmed. In other words, there has been one rejection or withdrawal for every 12 confirmations.

Prior to 1900, the story was different. In this earlier period, 53 men were confirmed to sit on the Supreme Court, but 20 nominations were refused. Sometimes the refusal occurred as an actual rejection after a vote. At other times the nominee's name was withdrawn when it became apparent that there would not be a confirmation. At still other times, the vote on confirmation was postponed indefinitely.

But the critical fact is that prior to 1900 there were two failures to confirm for every five confirmations, a markedly higher ratio than has occurred in this century.

As I have said, it is not easy to find a discrete pattern in the Senate's refusals to confirm. Sometimes the apparent reason was enmity between the Senate, which was controlled by one party, and the President, who was a member of another party. Occasionally there was personal or political hostility to a particular nominee. There is a higher rejection rate for nominations coming in the final year of a President's term. A candidate's perceived mediocrity or lack of integrity has sometimes been a contributing factor in the refusal to confirm. But it does not appear that a nominee's position on particular, current issues of constitutional law has played an express role in the Senate's decision to reject. This conclusion is certainly true in this century.

In sum, there have been 24 rejections and 101 confirmations. Prior to 1900, rejections occurred at a rate more than five times as frequently as they have thereafter. Of the 24 rejections, half represented nominations by five Presidents (Tyler, Fillmore, Grant, Cleveland, and Nixon), each of whom had two or more nominees rejected.

The Constitutional Convention did not clearly articulate the role the Senate was expected to play in exercising its advice and consent power. The decision to have the President appoint and the Senate confirm was an apparent compromise between those who wanted the appointment power to lie with the President alone and those who wanted to give it solely to the Senate. Until the very end, it seemed that the Convention was moving toward the latter position. In his diaries, Madison says that the requirements of confirmation would protect against "incautious or corrupt nomination" and against "flagrant partiality or error." In the Federalist Papers, Hamilton wrote that the Senate could be expected to weigh a nominee's "merit" and reject the appointment of "unfit characters." Although the quoted language is not self-evident, neither commentator seemed to envision an expansive role for the Senate.

The Senate's Role

In the balance of my testimony, I would like to discuss three subjects. I will first identify what I consider to be the clear areas of senatorial concern in deciding whether to vote to confirm a person as a Justice of the United States Supreme Court. I will then attempt to identify what I consider to be a "gray area," an area in which each Senator must conscientiously exercise his or her best judgment consistent with the Senate's institutional responsibility as a "confirming" body and not a "nominating" body. Finally, I wish to stress why I believe, particularly at this time in our nation's history, it is important that the Senate act with institutional responsibility on the nomination before it.

I believe there are five appropriate areas of inquiry. Four are fairly clear and are not likely to encounter much disagreement. They are:

> The age and physical health of the nominee. The Senate has a right to assure itself that the nominee is of an age and a state of health that makes it likely that he or she will serve a reasonable term. The Supreme

Court would suffer terribly from a series of short-term appointments. The great and ongoing constitutional debates in which it must engage depend on continuity of service. The remarkable success of this institution is due in part to the fact that, in its nearly 200 years, there have been only 101 justices, or a new appointment on the average of every two years. While I have not computed the median tenure of a Supreme Court Justice, it is worth noting that eight members of the current Court have been sitting for at least nine years. You have to go back to 1955, 26 years ago, to come up with a Court entirely different from the one we now have.

Intellect and judgment. These attributes are self-evident, although their assessment is not always easy. A nominee's professional career as a lawyer and, if he or she has been one, a judge, must be scrutinized. The nominee's standing among his or her peers at the bar should have some weight. Of course, the nominee need not be the most brilliant of the possible choices, but neither should he or she be mediocre. The job is too important for less than superior intellectual competence and judgment.

Temperament. This category subsumes emotional stability, graciousness under pressure, resilience in defeat, humility in strength, collegiality, the ability to listen, and the ability to change one's mind. Assessment of a nominee's character demands investigation of his or her standing among colleagues, subordinates, superiors, and adversaries. Furthermore, inquiries should go back at least to positions the nominee has held since graduation from law school.

Propriety or its appearance in a nominee's professional or public life. By propriety, I include integrity, honesty, law-abidingness, and a sensitivity to the appearance of each of these. On the other hand, technical or minor lapses, especially those occurring long ago in a nominee's career, are not, in my view, a basis to reject.

The fifth area of senatorial inquiry, the hardest, is the nominee's position on issues of constitutional law. I want to be emphatic about this. When it comes to current or emerging questions of constitutional law, it is decidedly not the Senate's function to enforce the IOUs that single-issue constituencies believe the President has given them and failed to honor. Those groups, if they wish to play a role in the selection of a Supreme Court Justice, may attempt to catch the President's ear before the nomination. If that fails, their only recourse is the ballot. The President exercises a much broader political discretion prior to nomination than does the Senate on confirmation.

Predictions about a nominee's position on emerging issues of constitutional law are for the President to attempt if he can. As we all know, presidents have often tried to select nominees based on anticipated attitudes toward constitutional questions. But these predictions are perilous. The positions a nominee may have taken in the trade-offs that accompany a public career are often reassessed in the cloister of life tenure.

Does the Senate, then, have any role to play in assessing a nominee's views on constitutional issues or his or her ideology? I think it does.

As Felix Frankfurter noted in 1930, cases before the Supreme Court involve "the stuff of politics." There are a number of constitutional rules which govern us and which, though dressed as rules of law, have been so far endorsed by other of our institutions that they are also a part of our common understanding as a people. That the "separate but equal" treatment of minorities is wrong; that an indigent accused is entitled to free counsel; that courts have power of judicial review; that states have broad authority to legislate for the health and welfare of their citizens; and that the First Amendment protects communication from prior restraint are a few clear examples of these abiding values.

The Senate may properly assure itself that a nominee will not seek to undercut these and other fundamental political arrangements through the guise of constitutional interpretation. In making this assessment, the Senate should seek information from the nominee and from others. A nominee's entire public life and career may properly be explored to test his or her commitment to these abiding political values. On the other hand, the Senate must be alert that men and women who become actively involved in the issues of their time -- even the unpopular ones -- should not suffer for their activism. It will be a sad day should it ever come, as some have suggested it already on occasion has, that a requirement for reaching the Supreme Court is to remain aloof from political and economic debate and to refrain from antagonizing important interest groups.

Finally, I believe that ideological insensitivity to the reasonable concerns of the nation's legitimate interest groups may, in an appropriate case, be a basis to deny confirmation. This basis need not be further explored today because it has no possible application to the nomination of Judge O'Connor.

There is a separate category of constitutional inquiry which I suggest falls outside the Senate's jurisdiction. This category is composed of emerging or current constitutional issues, those presently before the Court. There are several reasons why the issues in this category ought to be excluded.

First, as noted above, there is minimal utility in eliciting a nominee's views on current matters of constitutional law. Any commitment a nominee might be willing to give, directly or in veiled terms, could be reassessed, and would in any event be unenforceable, once the nominee is confirmed.

Second, the Senate is institutionally incapable of passing on the various current issues of constitutional law which its shifting majorities may consider to be a matter of present political import. In Judge O'Connor's case, for example, just as some conservative Senators may pause over her perceived support of a constitutional right to abortion, liberal Senators may be troubled by her apparent willingness to restrict federal court jurisdiction in cases charging a violation of civil liberties or civil rights. If each of these groups, and several others which may have their own areas of concern, felt institutionally free to insist on a nominee who agreed with its view on the particular matter, it is doubtful that anyone could be confirmed.

Third, even if a sizeable number of senators did concur on a current constitutional issue, insistence on a nominee who would agree -- directly or otherwise -- to adopt the same view in future cases would be unseemly and could arguably preclude participation, after confirmation, in cases raising that issue. Even more important, it ignores due constitutional process in a way I address shortly.

It is instructive, I believe, that in virtually none of the prior Senate rejections of presidential nominations to the position of Supreme Court Justice (and certainly none this century) has an expressed senatorial motive been the nominee's expected position on an emerging constitutional issue.

I recognize that there is no clear line between settled and emerging constitutional issues. Nor is either category static. Over time, issues once thought settled are questioned anew. Over time, too, a consensus develops about emerging issues and they become settled. In close cases, each Senator will have to decide for himself or herself, as each conscientiously weighs how to vote. But we need not spend a great deal of time attempting to splice the definition of "a close case." It is clear that the O'Connor nomination does not present one.

The O'Connor Nomination

If preliminary press reports are any guide, a central issue in the opposition to the O'Connor nomination will be her position on a constitutional right to abortion. I do not myself know her position. Apparently, groups and individuals opposing a constitutional right to abortion believe she supports one. If so, this is not a defensible reason to reject her nomination. Support of a constitutional right to an abortion is well within the mainstream of American law. Much judicial and scholarly authority recognize such a right. By a 7 - 2 vote, the Supreme Court agreed with this view eight years ago. It would be no more appropriate to deny Judge O'Connor's nomination for this reason than it would be were she to oppose or support other emerging constitutional principles, such as in the areas of the exclusionary rule, standing to sue, double jeopardy, or the definition of obscenity.

I recognize that there are persons and groups who do not believe there should be a constitutional right to an abortion. They have avenues to advance their cause. They can seek to persuade the Supreme Court that precedent in the area should be overruled or limited. Failing that, they may attempt to amend the Constitution. But the advice and consent power must not be used as a substitute for the amendment process, as an indirect means to reverse disagreeable Supreme Court positions.

Whether or not Judge O'Connor is fit to sit on the Supreme Court does not turn on whether or not she will promise to or can be expected to vote in a particular way in a future case raising a particular issue.

The Effect on Future Nominations

Finally, I would like to say something about why the line I attempt to draw in this testimony is so critical right now. As I said earlier, we have had 101 Justices in 192 years. This comes to an appointment, on the average, every other year. We have, however, had only one appointment in the last nine years. Five of the current Justices were born between 1906 and 1908. It is not unreasonable to expect that there will be five additional Court seats to fill before this decade is through. Going further, the current President and the next three persons to be elected president can be expected nearly to rename the entire Court.

This speaks to the Senate's institutional role. No one now knows who the president will be four, eight, or 12 years from now. No one now knows which party will control the Senate at any of these times. Precedent established with the current nomination will be invoked when future presidents nominate future men and women to sit on the Supreme Court. It would be extremely unfortunate if that precedent revealed a Senate willing to use the confirmation process to reject a nominee because she refused to adopt a particular position on an emerging constitutional question. Adoption of such a senatorial role would seriously weaken the Court and, eventually, the nation.

Thank you very much.

The **Chairman**. Our next witness is Ms. Eleanor Smeal, representing the National Organization for Women.

Ms. Smeal, will you hold up your hand and be sworn?

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **Smeal**. I do.

The **Chairman**. You may proceed, Ms. Smeal. Do you want to submit a statement for the record or do you want to speak off the cuff.

Ms. **Smeal**. I want to submit a statement for the record.

The **Chairman**. All right. Without objection, that will be included. Then try not to duplicate it because there is no use, if your statement is printed, then we do not want what you say to duplicate that.

Ms. **Smeal**. I will try not to duplicate it too much but——

The **Chairman**. If you want to summarize it——

TESTIMONY OF ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

Ms. **Smeal** [continuing]. Highlight it and summarize it, yes.

As president of the National Organization for Women, I am representing today the largest organization dedicated to the advancement of equal rights for women in the United States. On behalf of our membership I would like to urge this committee to confirm the nomination of Judge Sandra Day O'Connor.

This nomination, of course, is truly historic and is a major victory for women's rights. We believe it is both important symbolically and important actually. We believe that the long fight for women's rights is why we are here today. When we, the National Organization for Women, joined in this fight just 15 years ago, women were totally tokens in law schools and in participation as lawyers in the courts.

We think that Judge O'Connor's performance and her qualifications are more outstanding when you consider how extraordinary they are for a woman of her time and for the pervasive discrimination in the judiciary, in the law practice, during her whole career.

I would like to call attention, and I do not think anybody else has, not only to her experience in the law but to the fact that she has been a homemaker. We believe that this experience as a homemaker and a community volunteer, which is not unique for a woman, will add a unique and vitally new perspective to the Supreme Court.

There has been much made of her legislative record vis-a-vis social issues. We believe that her record indicates a commitment to equal justice under the law, and we believe that her record of sensitivity to women's rights issues is important. We have studied this record and we believe that it shows accomplishments in her concern for women over her total career.

We do not contend that the National Organization for Women agrees with all of the legal and political views of Judge O'Connor. As a matter of fact, we know that our own State organization, Arizona NOW, did oppose Judge O'Connor in some of her positions in her career as a Senator. However, we do not think that total agreement is necessary and we believe that there has been overall a commitment and an understanding of discrimination.

In fact, we think that it would be preposterous if she did not have such an understanding of discrimination because, as the first woman appointment, she will have a unique burden before the Supreme Court. The first black appointment, we would expect, would have been—and is, as a matter of fact—sensitive to discrimination against blacks. We think there should be no less expectation for the first woman appointment.

We believe, on the basis not only of an understanding of her record but upon interviewing many, many people who have worked with her throughout her lengthy career, that she indeed understands discrimination and that she is sensitive to the whole progress of women and minorities under the law.

By the way, we join in the other statements by professional women's organizations and the legal associations representing women. In fact, we also salute Judge O'Connor for her work through these organizations to eliminate sex discrimination. She has been a charter member of the National Association of Women Judges, the Arizona Women Lawyers, and Charter 100, which is a business and professional women's network group. Such groups work to the advancement of women in the professions.

We believe that Judge O'Connor's appointment is extremely important for the advancement of women, and in establishing the principle that there is no such thing as a "woman's place." We know that the opponents to Judge Sandra Day O'Connor say that they are for women's rights and the advancement of women but we warn that they are not. They have opposed women's rights almost at every significant turn, and we are not surprised by their opposition to Judge O'Connor.

In fact, we think that their questioning of her family values on one limited issue shows their own myopic views of the family. We firmly believe that the first woman Justice before the Supreme Court must by definition not be a traditional woman. However, we do believe that it is in the finest traditions of equality and justice for all.

Therefore, for all these reasons we urge her appointment. We would like to further urge that this committee look at the other 65 vacancies on the Federal district and appellate courts which to date, of the 46 individuals that have been named or confirmed, only 2 are females. We hope that Judge O'Connor is not to be tokenized but is one of many females, for equal justice under the law demands full representation of females in the Court.

Thank you.

The CHAIRMAN. Thank you for your appearance.

[Material follows:]

Testimony of Eleanor Cutri Smeal

President, National Organization for Women

As President of the National Organization for Women, I am representing today the largest membership organization in the United States dedicated to the advancement of equal political, legal, and economic rights for women. On behalf of NOW's membership, I would like to urge this Committee to confirm the nomination of Judge Sandra Day O'Connor for the position of Associate Justice to the U.S. Supreme Court.

The nomination of Judge Sandra Day O'Connor to the Supreme Court is truly an historic and a major victory for women's rights. After 191 years and 101 male justices, the appointment of the first woman to the Supreme Court is important both symbolically and actually.

The National Organization for Women has long been fighting for equal opportunity for women in law school and in the judiciary. When we began this fight some 15 years ago, women were outnumbered by men 23 to 1 in law school and less than 3% of the lawyers were female. Today some 32% of law school students are female, and over 7½% of all attorneys are female. In the past decade, the percentage of females in the judiciary has increased from 1% to approximately 7%.

The National Organization for Women has appeared before this committee before to voice our concerns about sex discrimination in the law, in the judiciary, and in appointments. The appointment of Judge Sandra Day O'Connor marks an end to the 191 year exclusion of females from the Supreme Court. Further, it not only opens an important door for women, but it also establishes a landmark in the journey toward full political and legal equality for women.

We believe that the appointment of Judge Sandra Day O'Connor is a result of years of work by women's rights advocates who will not accept the tortured reasoning that equal justice under the law is possible while women are excluded or have merely token representation in the ranks of the judiciary. We hope that the appointment of Judge Sandra Day O'Connor will be the first among many women to the Supreme Court, so that in the not too distant future the sex of an appointee will not be a consideration. Of course, that day is not here, and today's nominee is meritorious both because of her individual achievement and because she is the first woman appointment.

In fact, Judge Sandra Day O'Connor's achievements are even more remarkable considering the sex discrimination she had to face as a woman. The honors that she achieved in the Stanford law school class of 1952, as a law editor and high honor of the Coif, are impressive in their own right and even more outstanding to have been won by a woman in 1952. Her varied career is nothing short of remarkable considering the pervasive sex discrimination against women in the law profession during the 1950's, '60's, and '70's. As Deputy County Attorney, a civilian lawyer for the Army, a lawyer in private practice, an Assistant Attorney General in Arizona, the Majority Leader of the Arizona Senate (the first woman), as Superior Court Judge, and as an Arizona Court of Appeals Judge, she has a wide range of professional experience, unusual and nearly unobtainable for women at that time. Her experience as a homemaker and community volunteer, although not unique for a woman, will add a unique and vitally needed perspective to the Supreme Court.

Much has been made of the legislative record of Judge O'Connor vis-a-vis social issues. Her record indicates a commitment to equal justice under the law.

Her sensitivity to women's rights, we believe, is particularly noteworthy and important. Surely it would be a mockery of justice if the first female appointment to the Supreme Court -- the first woman to have so fully benefited from the work of those who have fought so hard for women's rights -- would be a woman who was not concerned with the advancement of women. Our investigation of Judge Sandra Day O'Connor's record clearly shows that she has demonstrated a sensitivity to discrimination against women and that she has worked to advance the legal status of women. Among her legislative accomplishments, many concerned women. For example, she:

- -- introduced and accomplished major revisions in community property law, e.g., abolishing husband management of the marital property.
- -- introduced and accomplished "sex-neutralizing" code language; state equal pay act.
- -- introduced and accomplished repeal of protective labor law limiting hours women could work.
- -- voted for bill allowing distribution of family planning information to minors without parents' approval (1973, SB 1190).
- -- introduced and accomplished divorce law reform, allowing no-fault; making child's best interest controlling; establishing conciliation court. Laws 1973, Ch. 139.

The National Organization for Women does not purport to agree as an organization with all of Judge O'Connor's legal and political views. For example, Arizona NOW opposed some of the changes in divorce reform Judge O'Connor sponsored while in the Arizona Senate. We believe, however, that discrimination she suffered, her life experiences, and her understanding of discrimination provide a necessary perspective to the Court. If she did not have such an understanding, it would be a travesty. No one would expect that the first Black appointment would be insensitive to discrimination against Blacks. Nor should one expect less of the first woman appointment.

Judge O'Connor has also demonstrated her concern for women's rights through support of professional associations working to eliminate sex discrimination. She is or has been a charter member of the National Association of Women Judges, the Arizona Women

Lawyers, and Charter 100 (a business and professional women's network group). She has been appointed as one of the few non-academics to serve on a state panel of the American Council on Education, which was organized to identify and promote top women to administrative positions in colleges and universities. And, as a victim of employment discrimination herself, she has deplored such unjust practices. In a 1971 interview, she said:

> "A woman with four years of education earns typically $6,694 a year while her male counterpart earns $11,795 for the same job. The more education a woman has, the wider the gap between men and women's earnings for the same work."

Judge O'Connor's appointment is extremely important for the advancement of all women and enshrines the principle that there is no such thing as a "woman's place." The opponents of Judge Sandra Day O'Connor's appointment, we warn, are really opposed to women's rights and the advancement of women. They have been opposed to every major proposal that would allow for significantly more opportunity for women. We are not surprised by their opposition to Judge O'Connor. The opposition to Judge Sandra Day O'Connor on the basis that she does not "respect traditional family values" only exposes its own myopic views of the family. We believe that many of those opposing her are doing so precisely because she is a woman who did not know her place. A female judge by definition is not a traditional woman. The first woman appointed to the Supreme Court cannot be and is not a traditional woman. In fact, she represents a wide departure from tradition. We believe, however, she also represents the best of American traditions which for too long has been ignored when it comes to females: Equality and Justice for All.

We urge your confirmation of a most remarkable woman whose record speaks for itself, and because her appointment is a long overdue victory for women's rights. Let no one here forget that it has taken the combined efforts of thousands, beginning with Myra Bradwell, and some 191 years, for a woman to be placed in nomination for Associate Justice of the United States Supreme Court.

The CHAIRMAN. Our next witness is Lynn Schafran, representing the Federation of Women Lawyers' Judicial Screening Panel.

Do you swear that the evidence you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. SCHAFRAN. I do.

The CHAIRMAN. Have a seat, Ms. Schafran.

I understand you are one of the most astute lawyers in New York, so we will be glad to hear from you.

TESTIMONY OF LYNN HECHT SCHAFRAN, ESQ., NATIONAL DIRECTOR, FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

Ms. SCHAFRAN. That is very kind.

I am a lawyer from New York, and I am here in my capacity as national director of the Federation of Women Lawyers' Judicial Screening Panel.

The Federation was organized in 1979 to evaluate the demonstrated commitment to equal justice under law of all individuals, women and men, under consideration for appointment to the Federal bench. It is not our task to duplicate the efforts of the ABA's Standing Committee on the Federal Judiciary. Rather, we are concerned that in addition to demonstrating ability, integrity, and judicial temperament, a nominee also have given tangible evidence of commitment to equal justice for those groups which historically have been legally disadvantaged. To date, this organization has provided the Senate Judiciary Committee with evaluations for more than 120 judicial nominees.

In evaluating Judge O'Connor, we were particularly impressed with her record as a legislator. Her practice on the bench was such that she was not dealing with civil rights and other issues which are usually taken to indicate a judge's position on equal justice matters. We note that as a legislator she took a strong leadership position in areas that addressed the questions of inequity under the law for women, minorities, the disabled, and the poor.

With respect to women's rights, she revised community property laws, labor laws, and many other statutes which were clearly discriminatory. She also took the leadership role in completely revising the Arizona mental health statutes to provide protection for individuals undergoing both voluntary and involuntary treatment for mental disorders, to protect their civil rights, and to bar discrimination against them in housing and employment. Because of her efforts, the Arizona mental health law is now looked on as a leading model for State commitment codes.

Judge O'Connor's concern for the problems of minorities and the poor were further demonstrated by her support for bilingual education and workers' compensation for migrant farm workers, a State supplement to Federal SSI, and the establishment of medicaid in Arizona. This is certainly an outstanding legislative record demonstrating commitment to equal justice.

We would like to note one area of strong concern to us, and that is the area that was addressed extensively by Senator Metzenbaum in the previous 2 days of hearings. It concerns the views expressed by Judge O'Connor in her now infamous and endlessly discussed

Law Review article pertaining to the litigation in Federal courts of civil rights suits brought against State officials under 42 U.S.C. 1983.

As you have all heard by now, Judge O'Connor has suggested that Congress cut back on this kind of litigation in the Federal courts by limiting or disallowing recovery of attorneys' fees. What has not received as much attention is the fact that she believes that there should be a requirement of exhaustion of State remedies as a prerequisite to bringing a Federal action under section 1983.

I would remind this committee that in its own report on the Civil Rights Attorneys' Fees Awards Act in 1976, as well as in the report of the House Judiciary Committee, there was a great stress on the fact that the vast majority of victims of civil rights violations cannot afford legal counsel, and that absent attorneys' fees these civil rights would become, I quote, "hollow pronouncements."

What Judge O'Connor proposes is that we have a massive shift of section 1983 litigation into the State courts by making it possible to recover attorneys' fees only in State courts. I would suggest, without wishing to cast any aspersions on the very many fine State court judges in this country, that this ignores litigants' historically valid reluctance to pursue their remedies in State courts, and that it ignores completely the history of the enactment of section 1983 which shows a clear policy preference for Federal enforcement of federally guaranteed rights.

Now this is an area that it is up to Congress to act in and, although I know that Congress will take Judge O'Connor's words and her suggestions very seriously, we are perhaps even more concerned with the question of exhaustion because as a Supreme Court Justice, if confirmed, she will have an opportunity to speak on exhaustion.

Exhaustion is a well-chosen word. If you have to work your way through State administrative and State court processes before you can get to the Federal courts, you will be exhausted. Requiring exhaustion will dissuade individuals from seeking the relief that section 1983 has promised.

However, we recognize that Judge O'Connor made these suggestions and wrote this article from the perspective of an extremely able and independent State court judge. We trust that as a Supreme Court Justice with a national perspective, she will realize that regrettably not all State court judges are as capable and independent as she, and that vindication of constitutional rights requires that section 1983 plaintiffs be able to choose their own forums and proceed to a swift resolution of their claims.

Despite this concern, I would reiterate that the Federation of Women Lawyers' Judicial Screening Panel believes that Judge O'Connor's legislative record and organizational activities clearly demonstrate her commitment to equal justice and her awareness of many of the problems confronting those segments of our society for whom the struggle for equal justice has been most difficult. These are attributes we seek in every judge but they are essential in a Justice of the Supreme Court, to whom we look for the ultimate protection and vindication of our constitutional rights.

The Federation of Women Lawyers' Judicial Screening Panel supports the confirmation of Judge O'Connor, and we trust that she will continue to demonstrate this commitment and awareness during what we expect will be many long years of distinguished service as an Associate Justice of the U.S. Supreme Court.

Senator Thurmond, I thank you, and I would ask that the full text of my statement be inserted in the record.

The CHAIRMAN. We want to thank you, Ms. Schafran, for your appearance here and the testimony you have given on this occasion.

[Material follows:]

TESTIMONY OF LYNN HECHT SCHAFRAN, ESQ., NATIONAL DIRECTOR OF THE FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL, AT THE CONFIRMATION HEARING OF SANDRA DAY O'CONNOR AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

My name is Lynn Hecht Schafran. I am an attorney and National Director of the Federation of Women Lawyers' Judicial Screening Panel. The Federation was organized in 1979 to evaluate the demonstrated commitment to equal justice under law of individuals under consideration for appointment to the federal bench. The Federation does not seek to duplicate the efforts of the ABA Standing Committee on the Federal Judiciary which evaluates nominees' legal skills and temperament. Rather, we are concerned that in addition to demonstrating ability, integrity and judicial temperament, a nominee must also have demonstrated commitment to equal justice under law for those groups which have historically been legally disadvantaged. To date the Federation has conducted detailed investigations of, and has provided evaluations to this Committee for, more than one hundred and twenty judicial nominees.

It is a particular pleasure to participate in these historic confirmation hearings for the first woman nominated to become a Justice of the United States Supreme Court. As an organization concerned with equal justice, we are acutely aware that women are among those for whom equal justice has often been most elusive. Nothing could better illustrate that sad reality than the fact that it was just over one hundred years ago that the Court to which Judge O'Connor has been nominated denied a woman a license to practice law solely because of her sex[1], and that, if confirmed, Judge O'Connor will be the first woman to sit on the Supreme Court in its 191 year history.

Even as we celebrate the historic nature of these hearings, we are aware that women still constitute less than seven per cent of the federal judiciary, and that no woman other than Judge O'Connor has been nominated to the federal bench during the nine months the current administration has been in office. We look forward to the day when the appointment of women and minorities to the bench will be commonplace, reflecting a true merit selection process by which all those who are qualified are considered, not just those who are qualified and are also white men.

The United States Supreme Court is our court of last resort, empowered to provide the ultimate interpretation of federal statutes and constitutional rights, and to nullify state and federal statutes which violate those rights. "Equal Justice Under Law" is the credo inscribed on the lintel above its entrance. It is thus fitting that we scrutinize with particular care the adherence to that credo of a nominee to the high court. To profess a commitment to equal justice is easy. But no one can predict with certainty what a judge will do on the bench, especially with lifetime tenure and under the unique circumstances of the Supreme Court. To attempt to ascertain beforehand, therefore, whether a nominee is indeed committed to equal justice under law, we are obliged to examine his or her record for tangible evidence of sensitivity to those groups for which equal justice has been a scarce commodity-women, minorities, the handicapped and the poor-to determine whether the nominee in his or her professional or personal life has taken concrete action, in a legal setting or elsewhere, to advance the status of these groups.

Since 1975, Judge O'Connor has been both a trial and appellate level judge. She is known for her absolute impartiality and meticulous devotion to the law. Because the practice before Judge O'Connor was such that she has not established a record which one can examine in cases respecting civil rights, employment discrimination and other areas of the law which are frequently cited as revealing a judge's commitment to equal justice, the Federation of Women Lawyers' Judicial Screening Panel has directed its inquiry primarily to an examination of Judge O'Connor's life experience, her record as a state legislator and the organizations in which she is involved. Although our inquiry has revealed some areas of concern, on the whole it reveals considerable evidence that in both her professional and personal life Judge O'Connor has demonstrated a sensitivity to the pervasive inequities in our society and a commitment to equal justice under law.

As a state senator from 1969 to 1973 and senate majority leader from 1973 to 1974, Judge O'Connor demonstrated this sensitivity and commitment by exerting leadership to address many of the problems confronting women, minorities, the disabled and the poor. With respect to women's equality under law, Judge O'Connor accomplished major revisions in the Arizona community property law[2], which had placed women at a great disadvantage. Prior to these revisions, women had no management rights to the assets of the marriage. Husbands had sole authority to manage the community's property, to bind the community through contracts for credit, etc. and to sell the community's personal property. Judge O'Connor was also responsible for revising discriminatory language in state statutues which, in their perpetuation of stereotyped views of women and the family, worked substantive harm to women[3]. She initiated repeal of so-called "protective" labor laws which, by limiting women to an eight hour work day also limited their opportunities for employment in high paying jobs and management, and supported full constitutional equality for women under the proposed federal Equal Rights Amendment.

While a senator, Judge O'Connor was acutely aware of employment discrimination against Arizona women. In a 1971 interview with Phoenix magazine she stated, "A woman with four years of college earns typically $6,694 a year while her male counterpart earns $11,795 for the same job. The more education a woman has, the wider gap between men's and women's earnings for the same work."[4] Judge O'Connor's ongoing concern with career opportunities for women and the need for women to join together to seek equality and appropriate recognition for their talents is demonstrated by her participation in the National Association of Women Judges and Arizona Women Lawyers, and her service on the Arizona panel of the American Council of Education's program to enhance opportunities for women college administrators.

Judge O'Connor's sensitivity to the real world experiences of women and equal justice issues are perhaps traceable to her personal experience with discrimination. After graduating from

Stanford Law School in 1952 rear the top of her class and with every honor, Judge O'Connor was refused employment as an attorney by law firms in Los Angeles and San Francisco solely because of her sex. One firm, ironically that of Attorney General William French Smith,offered her a job as a legal secretary.

As we have noted, Judge O'Connor's demonstrated commitment to equal justice under law has not been limited to the rights of women. One of her major undertakings as a senator was a sweeping reform of the Arizona mental health statutes respecting individuals undergoing voluntary and involuntary treatment for mental disorders.[5] Spurred by a 1971 volume of the Arizona Law Review devoted to a year long study of Arizona's commitment laws[6] and her experiences with the state hospital system while an assistant attorney general, Judge O'Connor spearheaded the development and enactment of legislation which tightened the substantive requirements for commitment and required that mental patients be made aware of their rights, be reexamined every ninety days and have an independent evaluator present at their hearings. Other provisions of this lengthy statute protect the civil rights of individuals undergoing mental treatment and bar discrimination in housing and employment against a person who is being or has been treated for a mental disorder. The Arizona mental health law is now looked on as a leading model for state commitment codes.

Judge O'Connor's concern for the problems of minorities and the poor are demonstrated by her support for bilingual education and workers' compensation for migrant farm workers, her sponsorship and enactment of a state supplement to federal Supplemental Security Income payments and her efforts to establish a Medicaid program in Arizona.

In the face of this substantial evidence of concern for equal justice issues, we are troubled that through her participation as a family member, Judge O'Connor supports two Arizona private clubs that discriminate against women. The Paradise Valley Country Club does not permit women to hold membership in their own right or to retain their husbands' memberships after the death or divorce of that spouse. Both the Paradise Valley and Arizona Clubs have restaurants segregated for men only.

Both clubs are practicing a form of invidious discrimination which is highly disadvantageous to women in their professional advancement and which, if practiced against a religious or minority group, would be immediately condemned. Recognizing the equal justice issues raised by these kinds of clubs, the United States Judicial Conference has endorsed the principle "that it is inappropriate for a judge to hold membership in any organization which practices invidious discrimination."[7] We assume that as a member of the Supreme Court Judge O'Connor will adhere to this standard and withdraw from participation in these clubs until they discontinue their discriminatory practices.

The Federation of Women Lawyers' Judicial Screening Panel is also concerned about the implications for equal justice of the positions advocated by Judge O'Connor in her recent article, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," respecting civil rights challenges to the acts of state officials pursuant to 42 USC §1983.[8] Judge O'Connor suggests that Congress cut back on section 1983 litigation in federal courts "by limiting or disallowing recovery of attorneys' fees"[9] and urges "a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under section 1983."[10]

The Reports from the Senate and House Judiciary Committees on the Civil Rights Attorney's Fees Awards Act of 1976 stress that "a vast majority of the victims of civil rights violations cannot afford legal counsel,"[11] and that absent attorney's fees awards "our civil rights laws [will] become mere hollow pronouncements which the average citizen cannot afford to enforce..."[12] Curtailing these awards in federal courts would deny equal access to justice to section 1983 litigants because rich plaintiffs will have their choice of forums while poor plaintiffs will be forced to litigate in state courts or not at all.[13]

Suggesting a massive shift of section 1983 litigation into state courts ignores litigants' historically valid reluctance to pursue their remedies in courts established, staffed, operated and funded by the state whose officials' acts are being challenged. Moreover, the history behind the enactment of section 1983 reveals a policy preference for federal enforcement of federally guaranteed rights. Shifting section 1983 cases into state forums would deny litigants the consistency of interpretation that follows from reliance on nationwide precedents and serves as a disincentive to protracted and unrealistic litigation.

With respect to exhuastion, requiring a section 1983 plaintiff seeking vindication of fundamental constitutional rights to work her way through a state administrative process and then through a state court proceeding before allowing her into federal court is a hideous burden. Forced subjection of such litigants to the time consuming, often ineffective and inadequate procedures afforded by varying jurisdictions can only dissuade them from seeking the relief section 1983 promised. It is a truism that justice delayed is justice denied.

We recognize that Judge O'Connor made these suggestions from the perspective of an extremely able and independent state court judge. We trust that as a Supreme Court Justice with a national perspective, she will realize that not all state court judges are as capable as she, and that vindication of constitutional rights requires that section 1983 plaintiffs be able to choose their own forums and proceed to a swift resolution of their claims.

Despite the concerns raised in this testimony, the Federation of Women Lawyers' Judicial Screening Panel believes that Judge O'Connor's legislative record and organizational activities clearly demonstrate her commitment to equal justice and her awareness of many of the problems confronting those segments of our society for whom the struggle for equal justice has been most difficult. These are attributes we seek in every judge, but they are essential in a Justice of the Supreme Court to whom we look for the ultimate protection and vindication of our constitutional rights. We trust that Judge O'Connor will continue to demonstrate this commitment and awareness during what we expect will be many long years of service as an Associate Justice of the United States Supreme Court.

FOOTNOTES

1. Bradwell v. Illinois, 16 Wall. 30 (1873).
2. Arizona Revised Statutes Sec. 25-214.
3. For example, Arizona Revised Statutes Secs. 12-612 and 12-641 which had given fathers only the right to maintain an action for the death or injury of a child.
4. Hartwell,"Sandra", Phoenix , February 1971 at 37.
5. Arizona Revised Statues Sec. 36-504 et seq.
6. 13 Arizona Law Review 1971.
7. Commentary to Canon Two of the United States Code of Judicial Conduct adopted March 1981, incorporating principle endorsed in March 1980. The Senate Judiciary Committee heard extensive testimony respecting judges' memberships in discriminatory clubs and organizations in 1979.
8. 22 William and Mary Law Review 801 (1981).
9. Id. at 810.
10. Id. at 815.
11. H.R.Rep. No. 1558, 94th Congress, 2nd Sess. 1 (1976).
12. S.Rep. No. 1011, 94th Congress, 2nd Sess. 6 (1976).
13. State courts may award attorney's fees in section 1983 actions. See, Maine v. Thiboutot, 488 U.S. 1 (1980.

The CHAIRMAN. Now our last witness is Ms. Rita Warren. Ms. Warren, come around.

Ms. Warren, hold up your hand and be sworn.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WARREN. I do.

The CHAIRMAN. You may proceed, Ms. Warren.

TESTIMONY OF MS. RITA WARREN OF WASHINGTON, D.C.

Ms. WARREN. Senator, I want to thank you very much—I will not even try to take the 5 minutes—for having me testify. I do fully support the appointment of the Justice for the Supreme Court, Mrs. O'Connor.

I do share with Senator Metzenbaum the feeling that all of the groups that have been here speaking in regard to the unborn child are very serious, but I am more concerned about the child that is here already, and that is starving to death. Living under the Nazi regime in Italy, I know the suffering of hunger, and I would rather die than see a child suffering of hunger. We have many children that are starving to death; we have retarded children neglected; and all these groups are so concerned about the unborn.

I do not support the abortion but I do not feel that we have any right to force upon other people, on their moral life, how to live. If the church leaders and if many of the other community organizations would do their job properly to encourage morality, we would not have so much problem with abortion.

Therefore, I really feel it is wonderful to have a woman in the Supreme Court. I hope that I can live to see the day when we can see a woman in the White House also because, as you know, we women do keep a house clean very well, and I am sure we could keep the White House really sparkling white, in and out. I hope that someday we can see that too.

I hope that this committee will give Mrs. O'Connor the chance to become a Justice of the Supreme Court because in our democratic system that I love so much, everyone has a right to become and to serve publicly in this country, regardless of whether it is a Justice of the Supreme Court or President of the United States.

Thank you very much.

The CHAIRMAN. Thank you for your appearance.

Judge O'Connor has responded to some questions by Senator Levin, and if there is no objection we will place those in the record.

This completes the nomination hearings on Sandra O'Connor. We have tried to give an opportunity to the people who favored her and the people who opposed her. I wish to express my appreciation to all the witnesses who came and testified, pro or con. I wish to thank the press for their attendance, and I wish to express my appreciation to those in the audience for the fine attention that they gave to the hearing.

The committee now stands adjourned.

[Whereupon, at 4:26 p.m., the committee recessed, to reconvene at the call of the Chair.]

[The following material was subsequently supplied for the record:]

Honorable Carl Levin
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

I have received from your office the following question: "During your private meetings with public officials since your appointment, did you make any statements relative to your position on the substantive issues which may come before the Court? If so, please describe those statements."

Since my nomination I have not made any statements concerning my position on substantive issues which may come before the Court, either in private meetings with public officials or public testimony. Nor did I do so during the selection process leading up to the nomination.

I believe judges must decide legal issues within the judicial process, constrained by the oath of office, presented with a particular case or controversy, and aided by briefs, arguments, and consultation with other members of the panel. I also believe it would be quite improper for a nominee to take a position on an issue which may come before the Court in order to obtain favorable consideration of the nomination.

Thank you for the opportunity to set forth my views in response to your question.

Sincerely,

Sandra D O'Connor
Sandra D. O'Connor

THE CASE AGAINST WOMEN IN CERTAIN OCCUPATIONS

(By Willel W. G. Reitzer, private citizen, Washington, D.C.)

A century ago, Justice Joseph Bradley of the U.S. Supreme Court wrote in a decision upholding the right of a State to deny a woman a license to practice law: "The harmony, not to say identity, of interests and views which belong or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband" (Bradwell v. State, 1872).

This is not a wild harebrained notion such as sometimes slips into our highest court's opinions. Rather it was a fundamental precept firmly fixed in the common law—that respectable system of jurisprudence which underlies our national foundation.

But it did not originate there. Interestingly, those who rail against this precept do not seem to know where it did originate. Some ascribe it to romantic paternalism; others to a male conspiracy to perpetuate male ascendancy. The fact is, it goes clear back to Creation.

Holy Writ informs us that after God created a man, and then made a woman "out of" him and "for" him, He said: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh" (Genesis 2:24). One flesh means one entity: one mind, one interest, one aspiration. Jesus Christ Himself upheld the authenticity of this precept—as well as the historicity of this event (Matthew 19:4,5).

No wonder Justice Bradley went on to say: "So firmly fixed was this sentiment in the founders of the common law that it became a maxim . . . that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states" (e.s.). Hence women had no separate right to make contracts, to vote, to hold public office, to enter the priesthood and certain other occupations.

What happened in 100 years to bring about so great an erosion? It is the Garden of Eden syndrome all over again. Believing the forbidden fruit to more fulfilling, the woman reached out for it and ate. And she offered it to the man, and he ate also. It keeps recurring in history. In the 8th century B.C., prophet Isaiah lamented a national spiritual decline in ancient Israel: "As for my people, children are their oppressors, and women rule over them. O my people, they which lead thee cause thee to err. . . ." (Isa. 3:12).

Here is grievous error indeed: direct tampering with the Creator's design for His beloved creatures, implying He was either inept or deliberately deprivative. Restructuring it disparages His wisdom and justice and goodness.

And for what? For blanket equality of roles for men and woman. Why is this so superior? This does not exist even among the angels—nor among the three Persons of the blessed Trinity. For it is not a matter of ability or opportunity, but of organization. Every creature has its God-given role. Therefore each has its particular endowments. The male-female distinction is so basic to planet earth it pervades also the animal, fish, and fowl realm. It serves to reflect a subordination principle that also pervades the supernatural realm, and is not only for instruction. It also facilitates efficient human function, as well as the acquisition of virtue—particularly the greatest of them: not equality, but love (which is much more noble and meaningful between superiors/subordinates than between equals). In God's plan the basic social unit is the family, not the individual or the state. So fathers are to be breadwinners and mothers—and grandmothers—homemakers (1 Tim.3:14; Tlt. 2:8-5). The percept of authority in the male perforce is exclusive; women are not even to put themselves into positions of teaching or commanding men outside the home (1 Tim.2:12-15). Thus it was wise of our juridical forefathers to incorporate this design into law, thereby affording the marriage institution needed protection against temptations to undermine it.

Equality is not proving itself superior in practice. On the contrary. As more women go into more occupations, divorce rates keep climbing, male unemployment and instability keep increasing. The hard fact is: Mrs. O'Connor is putting another man out of work. She is setting and example and precedent that will put other men out of work. Women in certain occupations put greater strain on men: pyschologically, sexually, in other ways. All this in turn puts a greater strain on family members, on the family as an institution, and on society as a whole. The result is the social fabric keeps developing new tears—and the innocent in some measure having to suffer adversity along with the guilty.

What then is the bottom line? It is the same the Apostle Paul made on Mars' Hill in Athens when he confuted the sophistry of the Greek philosphers who had perverted basic truths that regulated paramount human conduct (Acts 17:30,31): Cease and desist, for there is a Judgment Day coming when everyone will have to give an account of what he has done here on earth whether it be good or evil.

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